Supreme Court, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Ph.D., Warden S.C.I. Camp Hill; THE DISTRICT ATTORNEY OF PHILADELPHIA, Lynn Abraham; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Mike Fisher,

Petitioners,

v.

GERALD EVERETT,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where a state court rejects a claim of trial counsel's ineffectiveness, relying upon state court opinions rather than federal cases -- but applying a legal standard identical to federal requirements -- has the state court "adjudicated" the ineffectiveness claim within the meaning of the federal habeas statute, or may the federal court ignore the state decision and review the claim *de novo*?

(The United States Court of Appeals for the Third Circuit held that *de novo* review was required.)

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ORDERS AND OPINIONS BELOW

The May 2, 2002, judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court, is reported at 290 F.3d 500 (3d Cir.), and is reprinted in the Appendix at App. 3. The May 31, 2002, order of the Third Circuit denying the state's Motion for Rehearing *En Banc* is reprinted in the Appendix at App. 1. The May 3, 2000, order of the district court denying the petition for writ of habeas corpus is reprinted in the Appendix at App. 36. The Report and Recommendation of the United States Magistrate Judge, adopted by the district court, is reprinted in the Appendix at App. 38.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state criminal defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated May 2, 2002, reversing the order of the district court, and granting the writ. The court denied *en banc* rehearing on May 31, 2002. This Court subsequently granted petitioners an extension of time in which to file this petition. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

On July 17, 1979, at approximately 1:30 p.m., respondent Gerald Everett drove two accomplices to a small Philadelphia candy store to commit an armed robbery. He dropped them off, and circled around the block.

As Bernard Ferguson, who was working behind the counter, sold candy to one of the men, the other suddenly pulled out a gun and ordered Ferguson to lie on the floor. When Ferguson did not react, the gunman pushed his head

onto the counter. From this position, with a gun to his head, Ferguson could see that the other man had pointed a gun at the store owner, sixty-year-old John Jennings, Ferguson's godfather. Jennings, who was behind the counter, grabbed for the gun. In the ensuing struggle, the candy counter was overturned and Jennings was thrown to the floor.

At that point, the man who had been holding a gun to Ferguson's head walked over to Jennings and shot him twice, from point blank range. One bullet struck the victim directly in the chest; he died from this wound shortly afterward.

The two gunmen fled. Everett's car came quickly down the block, and slowed to pick the two men up. One of the gunmen yelled, "Get us away from here," as he jumped in. The car then sped off.

Everett drove the gunmen -- Robert Burgess and Raymond Gray -- to Gray's house, where the two men left their guns; ultimately, Everett drove the men to Sharon Hill, Pennsylvania. When Everett returned home, his wife informed him that homicide detectives, who had traced Everett via the license plate on the getaway car, wanted to speak with him. Everett told police he drove the two men to and from the vicinity of the shooting but denied knowledge of the robbery and murder. He later admitted, however, that he was aware that the two planned to commit a robbery and that he acted as an accomplice. At trial, he backed off from the latter version of events, saying that while Burgess and Gray had discussed the robbery as he drove them to the scene, he was not a participant in the crime.

A jury convicted Everett of first-degree murder and related charges in October, 1980, and he was sentenced to

life imprisonment. He took a direct appeal to the Pennsylvania Superior Court (the state's intermediate appellate court), which affirmed the judgment of sentence. Commonwealth v. Everett, 299 Pa. Super. 182, 445 A.2d 514 (1982). Everett then sought review by the Pennsylvania Supreme Court, which denied permission to appeal on August 31, 1982. Commonwealth v. Everett, No. 310 E.D. Alloc. Dkt 1982.

On October 4, 1982, Everett filed a pro se petition for state collateral review under the former Pennsylvania Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat .Ann. § 9541 et seq. (1982) (now superseded), raising several claims of ineffective assistance of trial counsel. Counsel was appointed and filed an amended petition, but he subsequently withdrew it. After Everett appealed with the help of new counsel, the Superior Court remanded the case for more proceedings. Commonwealth v. Everett, 350 Pa. Super. 631, 503 A.2d 455 (1985) (table). New counsel was appointed, and she filed another amended PCHA petition. Several months later, however, Everett sent a letter to counsel instructing her to withdraw the petition. Counsel complied with this request, thus ending that round of state collateral litigation.

Two years later, on January 25, 1988, Everett, with new counsel, filed a third PCHA petition, this one raising claims of ineffective counsel based on the conduct of trial counsel and the prior PCHA attorneys. After an evidentiary hearing, the PCHA court denied relief. Everett again appealed to the Superior Court, complaining that trial counsel was ineffective in failing to object to remarks in the prosecutor's closing argument. The Superior Court affirmed the denial of collateral relief. Commonwealth v. Everett, 399

Pa. Super. 646, 573 A.2d 1157 (1990) (table). The Pennsylvania Supreme Court denied allowance of appeal. Commonwealth v. Everett, 527 Pa. 585, 588 A.2d 507 (1991) (table).

On August 25, 1995, Everett, represented by his current counsel, filed his fourth petition for state post-conviction collateral review. By this time, the Pennsylvania collateral review statute had been amended and re-named the Post Conviction Relief Act (PCRA). Petitioner again raised issues of ineffective counsel, among them a claim that trial counsel provided ineffective assistance by failing to object to the jury charge on accomplice liability. The Honorable David N. Savitt, sitting as the PCRA court, denied the petition on June 12, 1996. Judge Savitt's opinion is reproduced at App. 61.

Everett appealed once again to the Superior Court, contending that his serial post-conviction petition could properly be entertained on its merits to prevent a miscarriage of justice per Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988). He also presented his claim that trial counsel rendered inadequate assistance in failing to object to the accomplice liability charge. The Superior Court affirmed the denial of PCRA relief in an unpublished memorandum opinion filed on June 17, 1997. Commonwealth v. Everett, 700 A.2d 1024 (Pa. Super. 1997) (table). This opinion is reproduced at App. 56. Pursuing the same issues, Everett sought review by the Pennsylvania Supreme Court, which denied this petition without comment on October 30, 1997. Commonwealth v. Everett, 550 Pa. 677, 704 A.2d 634 (Pa. 1997) (table).

Everett filed a Petition for Writ of Habeas Corpus on October 19, 1998. He raised one claim -- that his trial counsel was constitutionally ineffective for failing to object to the trial court's charge on accomplice liability. On June 18, 1999, Magistrate Judge Diane M. Welsh issued a Report and Recommendation in which she recommended that the petition be denied. App. 38. On May 3, 2000, the Honorable Lowell A. Reed, Jr., of the Eastern District of Pennsylvania, issued an order approving and adopting these recommendations, and denying Everett's petition. App. 36.

In sum: As of May, 2000, Everett had taken one direct appeal, and litigated four state petitions for collateral review, in addition to his federal petition for habeas corpus. At that point, five different tribunals (including two federal judicial officers) had heard petitioner's present claim of ineffectiveness, and *none* had found reason to grant relief. Almost one year later, however, the United States Court of Appeals for the Third Circuit granted Everett a Certificate of Appealability on March 21, 2001, on the following issue: "[W]hether trial counsel was ineffective for failing to object to the jury instructions concerning the charge of first-degree murder." App. 35.

After briefing and argument, the Third Circuit reversed and granted Everett a new trial, finding that defense counsel had been ineffective for not objecting to the court's instructions on accomplice liability. Everett v. Beard, 290 F.3d 500 (3d Cir. May 2, 2002). App. 3. The panel framed the issue, not in terms of the reasonableness of the prior state court decision, but as "whether we can do anything about Everett's conviction ..." App. 5. The court reviewed the claim *de novo*, refusing to apply the deferential habeas standard of review even though the state court had rejected

the same ineffectiveness claim. App. 15-16, 18. The Commonwealth timely sought *en banc* rehearing of the panel's decision, which was denied on May 31, 2002. App. 1.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to reaffirm that federal courts *must* apply the deferential habeas standard of review to state court decisions interpreting the Sixth Amendment; *de novo* review is not appropriate simply because the state court cited state decisions that set out the federal ineffectiveness standard.

In the opinion below, the Third Circuit held that respondent Everett's trial counsel was ineffective because he did not object to the trial court's definition of accomplice liability. Although the state courts had earlier rejected an identical ineffectiveness claim, the panel refused to apply the deferential habeas standard of review. In the panel's view, the state court did not sufficiently explain that it was deciding a *federal* claim of ineffectiveness, rather than a claim based on the Pennsylvania Constitution. The panel reached this conclusion, despite the fact that the state courts have firmly and repeatedly held that the standards are exactly the same -- indeed, Everett himself did not distinguish between them in his briefing before the state or federal courts.

The Third Circuit does not say that the state courts used the wrong standard. Apparently, the state courts were simply not explicit enough that this was a *federal* claim of ineffectiveness they were deciding. This is an important holding, because state courts often rely solely upon state

cases in rejecting federal claims; the distinction is often not explicit.[1] The Third Circuit's approach -- which goes far beyond anything held by any other circuit court, as explained below -- threatens to disturb the proper application of the habeas standard of review in all of these cases.

The panel's error resulted from its remarkable, and palpable, reluctance to apply the correct standard of review. The court framed the issue not as an application of law, but

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[1] There are literally hundreds (if not thousands) of cases in Pennsylvania that cite state decisions -- not federal cases -- for the ineffectiveness standard. In the past few weeks alone, there have been several published decisions that have taken this approach. See Commonwealth v. Miller, No. 292 C.A.P., Slip Op. at 20-21, 2002 WL 31013386 (Pa., Sept. 5, 2002) (capital case); Commonwealth v. Heggins, No. 1823 W.D.A. 2000, Slip Op. at 6-7, 2002 WL 31080812 (Pa. Super., Sept. 1, 2002); Commonwealth v. McManus, Nos. 479 W.D.A. 2001; 521 W.D.A. 2001; 523 W.D.A. 2001, 2002 WL 1941682, *1 (Pa. Super., August 23, 2002); Commonwealth v. Peay, No. 1047 E.D.A. 1999, 2632 E.D.A. 1999, 2633 E.D.A. 1999, 2002 WL 1838171, *4 (Pa. Super., August 13, 2002); Commonwealth v. Khalil, No. 1856 M.D.A. 2001, 2002 WL 1772634, *4 (Pa. Super., August 2, 2002).

Of course, there are many earlier cases, and unpublished decisions, that have done the same thing. If the Third Circuit is correct, then presumably all of these ineffectiveness claims, too, would be reviewed *de novo* in a federal habeas action.

as a challenge to its authority: "The question before us is *whether we can do anything about Everett's conviction ...*" App. 5. In other words, the issue was whether the court could overcome any impediments to its own view of the merits.

The main roadblock, of course, was that the state courts had already decided and rejected the same allegation of ineffectiveness. The Pennsylvania Superior Court (the intermediate appellate court) clearly held that Everett's trial counsel could not be ineffective for failing to predict changes in the law. The court did not explicitly cite federal cases on the subject -- Everett had not cited any, either -- but it relied upon a series of state cases that set out the well-settled federal ineffectiveness standard, as described by this Court in Strickland v. Washington, 466 U.S. 668 (1984). In other words, the state appellate court cited state cases that correctly defined the federal standard. Indeed, the Third Circuit itself has previously recognized that the Pennsylvania ineffectiveness standard and Strickland are one and the same. See Werts v. Vaughn, 228 F.3d 178, 203-04 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

Furthermore, the PCRA trial-level court *did* explicitly rely on Strickland in its opinion. App. 62-63. The Superior Court, in turn, stated that the PCRA court had "cogently explained" the issue and "properly disposed of this claim." App. 59-60. Thus, the Superior Court approved of the lower court's reasoning, necessarily including Judge Savitt's application of Strickland. At the very least, the Third Circuit was plainly wrong when it held that "Everett's claim based upon the Strickland ineffective assistance standard was addressed neither by the Court of Common Pleas nor the Superior Court of Pennsylvania." App. 18.

According to the Third Circuit's new rule, federal habeas courts will defer only to state decisions that explicitly rely upon federal authority, and apparently approval of a lower court's citation to federal authority is not sufficient. This is a significant and puzzling error. No other circuit court has ever suggested that citation to a state case applying a federal standard, or interpreting federal law, results in *de novo* review. But the opinion below is more than a curiosity -- it is a published, precedential decision. It was cited and further explained by another Third Circuit panel just a few days ago, in Marshall v. Hendricks, No. 00-9004, Slip Op. at 44, n.18 (3d Cir., Sept. 11, 2002).[2] There is every reason to believe that other habeas petitioners will argue for its application in pending cases raising similar claims. See, e.g.,

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[2] The Marshall panel stated that "[i]n Everett, the Pennsylvania courts did not address the petitioner's due process claim at all, and analyzed his ineffectiveness claim not under a Strickland analysis, but under standards set by its own precedent, different from those enunciated in Strickland." Slip Op. at 44, n.18. This is wrong, for two reasons: (1) Everett did not bring a "separate" due process claim -- his sole allegation was that his counsel was ineffective for objecting to the accomplice instructions, and he argued that the instructions violated state law and due process; and (2) the Pennsylvania ineffectiveness standards are not "different" from Strickland. The Pennsylvania courts have repeatedly said that the Pennsylvania ineffectiveness rule is the *same* as Strickland. Until Everett, the Third Circuit had recognized that similarity. See, Werts, 228 F.3d at 203-204.

Abu-Jamal v. Horn, ___ F. Supp. 2d ___, 2001 WL 1609690, *54 (E.D. Pa. 2001) (Yohn, J.) ("While the state courts did not specifically identify Strickland, the Pennsylvania case law they did reference [i.e., Pierce] articulates a nearly identical standard ..."; applies deferential AEDPA review). See also Young v. Vaughn, 2002 WL 393106, *6-7 (E.D. Pa. 2002) (Padova, J.) (federal habeas courts should apply deferential standard under similar circumstances); Pursell v. Horn, 187 F. Supp.2d 260, 340 (W.D. Pa. 2002) (Smith, C.J.) (same). The Third Circuit has clearly made a mistake, and this Court should grant *certiorari* to prevent the confusion and unfairness that will result from this decision.

A. The Pennsylvania courts adjudicated Everett's ineffectiveness claim on the merits, and therefore the deferential habeas standard must apply to this claim.

Under the current habeas statute -- as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") -- the writ cannot be granted unless the state court's decision was contrary to, or an unreasonable application of, clearly established federal law as established by this Court. The AEDPA standard of review *must* be applied to all properly raised federal habeas claims that were "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d)(1). The meaning of that phrase is relatively clear: A claim is "adjudicated on the merits" if the state courts resolve it on substantive grounds, as opposed to procedural grounds. Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001), *citing* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

The state courts here adjudicated Everett's ineffectiveness claim on the merits. The trial judge who heard Everett's petition for collateral review held that "trial counsel cannot be held to be ineffective for failing to raise an issue which was not law at the time." App. 63. Among other cases, the court cited both Strickland, and Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987) -- the leading Pennsylvania ineffectiveness case -- for the relevant ineffectiveness standards.

On appeal, the Pennsylvania Superior Court affirmed, again on the merits. The court set out the ineffectiveness standard as follows:

> We presume that trial counsel is effective and place on the defendant the burden of proving otherwise. Commonwealth v. Williams, 524 Pa. 218, 230, 570 A.2d 75, 81 (1990). We are first required to determine whether the issue underlying the claim is of arguable merit. Commonwealth v. Johnson, 527 Pa. 118, 122, 588 A.2d 1303, 1305 (1991). If the claim is without merit, our inquiry ends because counsel will not be deemed ineffective for failing to pursue an issue which is without basis. Id. Even if the underlying claim has merit, the appellant still must establish that the course of action chosen by his counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial. Id.; Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). The same showing of prejudice must be made by an appellant whether on direct appeal from a judgment of sentence or on appeal from denial of

PCRA relief. Commonwealth v. Kimball, --- Pa. Super. ---, 683 A.2d 666 (1996) (en banc).

App. 58-59. The court went on to cite Commonwealth v. Beasley, 678 A.2d 773 (Pa. 1996), for the proposition that "counsel cannot be ineffective for failing to raise a meritless objection ... or for failing to predict legal developments", and concluded that "Judge Savitt [the trial judge who rejected Everett's collateral petition] properly disposed of this claim." App. 59-60.

It is not surprising that the Superior Court did not expressly rely on Strickland or strictly characterize Everett's claim as a "Sixth Amendment" claim. In fact, Everett himself did not distinguish between a *federal* ineffectiveness claim and a *state* ineffectiveness claim in his state appellate brief: He simply urged the courts to find that his counsel had rendered inadequate assistance, without specifying the legal source of his argument. App. 65-74.

This is a common approach in this Commonwealth, because there is no difference between the Pennsylvania ineffectiveness rule and its federal counterpart. See cases cited *supra* n.1. Indeed, the Third Circuit's refusal to defer to the state court results from a fundamental misunderstanding of ineffectiveness jurisprudence as it has developed in the Pennsylvania state courts. In Pierce -- cited by the Superior Court here -- the state supreme court clearly explained that there is *no such thing* as a separate Pennsylvania ineffectiveness claim. The Court explicitly rejected the notion that Strickland is somehow different from the Pennsylvania standard: "The fact of the matter is that ...

together they constitute an identical rule of law in this Commonwealth." 527 A.2d at 967-77.

When the Superior Court cited Pierce and other Pennsylvania cases in rejecting Everett's ineffectiveness claim, the Court invoked this "identical rule of law" and applied it to Everett's case. It makes no sense to say, as the panel did, that the Superior Court decided one but not the other -- "together they constitute the same rule." Pierce, 527 A.2d at 976. The whole point of Pierce is that proper resolution of *all* ineffectiveness claims in Pennsylvania requires application of the Strickland standard.

The problem can be illustrated this way: If Pierce himself sought review of his ineffectiveness claim by way of a federal habeas petition, there would be no doubt that the "adjudication on the merits" requirement was satisfied -- the state supreme court clearly stated in Pierce that it was applying the Strickland standard. The Superior Court in *this* case simply cited to Pierce (and to other Pennsylvania cases) as it applied the same test. The other cases relied upon by the Superior Court also reiterated the same test -- indeed, every one of them cited to Pierce itself. See Johnson, 588 A.2d at 1305; Williams, 570 A.2d at 81; Kimball, 683 A.2d at 668-69. In fact, the Kimball court cited to both Pierce and Strickland and repeated yet again the truism that these standards are identical. 683 A.2d at 669. There is simply no getting around it -- *the state courts applied the Strickland standard in this case.*

The Third Circuit chose its novel approach without much explanation, and without any input from the parties -- even Everett assumed that the AEDPA standard *did* apply. The court said only that it was not "clear from the face of the

state court decision that the merits of the petitioner's [federal] constitutional claims were examined ..." App. 15. The panel seemed to assume that there is a difference between state and federal ineffectiveness claims, and that assumption was made explicit a few days ago in Marshall, *supra* n. 2. As explained above, however, the state courts have repeatedly said exactly the opposite, and the Third Circuit has itself previously recognized the identical nature of state and federal ineffectiveness law. See Werts, 228 F.3d at 203-204. The conclusion is inescapable: In its eagerness to engage in *de novo* review, the panel simply ignored the law.[3]

It may be that the panel believes that the state courts are wrong, and that there *is* a difference between the federal ineffectiveness standard and the Pennsylvania rule. But if the state courts have held that the state standard is identical to Strickland, that settles the matter -- the federal courts must treat the state court decision as an attempt to apply

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[3] The panel's hostility to the AEDPA standard of review is also evident in its discussion of Williams v. Taylor, 529 U.S. 362 (2000). App. 16 & n.3. The panel cites Williams for the proposition that the federal courts have an "independent obligation to say what the law is." App. 16. While that is a correct quote from Williams, it is rather misleading -- the *holding* of Williams is that federal courts must now defer to reasonable state interpretations of federal law. Furthermore, in footnote 3, the court below explains at length that "no single opinion in Williams garnered a majority," as if that somehow renders the Williams/AEDPA standard illegitimate. App. 16 n.3. That standard is not illegitimate; it is the law and it is mandatory.

Strickland. On the other hand, the Third Circuit may believe that the state courts are *trying* to apply the Strickland standard, but are actually applying it incorrectly. Even if there were some reason to believe that the Pennsylvania courts are inadvertently applying the "wrong" standard -- there is none -- this does not mean that AEDPA does not apply. On the contrary, in such a situation the federal court can find that the state courts' decision was contrary to, or an unreasonable application of, federal law. What the federal court *cannot* do is refuse to apply AEDPA altogether.

The panel's decision to review Everett's ineffectiveness claim *de novo* has no support in this Court's jurisprudence. The opposite is true. In fact, in Bell v. Cone, 122 S. Ct. 1843 (2002), this Court applied the AEDPA standard to an ineffectiveness claim under almost identical circumstances.[4] Cone first presented his claim to the Tennessee courts; in rejecting it, the Tennessee appellate court cited only Tennessee state precedent, and did not distinguish between state and federal ineffectiveness standards. Cone v. State, 747 S.W.2d 353, 357-58 (Tenn. Crim. App. 1987). Specifically, the Tennessee court relied upon Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), which had explained that the Tennessee ineffectiveness standard was identical to the Sixth Amendment standard. In other words, Baxter was the Tennessee equivalent of Pierce.

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[4] This Court issued the Bell decision while the government's Petition for Rehearing in this case was pending in the court below. The government submitted a notice of supplemental authority to the Third Circuit, citing Bell. Nevertheless, the Third Circuit denied rehearing without comment. App. 1-2.

This Court noted the equivalence of the two standards, and proceeded to apply the deferential habeas standard of review. 122 S. Ct. at 1849-50.

This is common sense. Once a state court has held that its ineffectiveness rule is the same as Strickland, there is no need to repeat this holding in every case. State courts do not forfeit AEDPA protections by citing their own precedent rather than repeat the Strickland comparison which they have already undertaken.

The panel's refusal to apply the AEDPA standard of review also places the court below in conflict with other Circuits. Indeed, that is something of an understatement -- the panel's holding goes far beyond anything held by the other courts of appeals. Most Circuits have held that AEDPA applies even where the state court rejected the prisoner's appeal without explicitly referring to the federal claim at all. See, e.g., Sellan v. Kuhlman, 261 F.3d 303, 311-14 (2d Cir. 2001) (collecting cases from around country holding that AEDPA applies even to such summary decisions). No court has held that a state court that applies the *correct* ineffectiveness standard nevertheless forfeits AEDPA protections because it has cited the wrong case (i.e., not a federal case). All the Circuits have gone the other way -- concededly without much discussion, as no other Circuit seems to have even considered refusing to apply AEDPA under these circumstances. See, e.g., Cooey v. Coyle, 289 F.3d 882, 2002 WL 552854, *9 (6th Cir. 2002) (applying AEDPA standard to Ohio court's rejection of ineffectiveness claim where Ohio court relied only upon state caselaw); Sellan, 261 F.3d at 308 (applying AEDPA where New York court cited only one New York state case in summarily rejecting ineffectiveness claim). See also Bell v. Jarvis, 236

F.3d 149, 160 (4th Cir. 2000) ("[AEDPA] does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one ..."), cert. denied, 122 S. Ct. 74 (2001).[5]

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[5] The panel's holding also has important implications for the law of exhaustion. If federal and Pennsylvania ineffectiveness are really two separate claims, then a Pennsylvania prisoner who, during his state appeals, cites only Pennsylvania cases in support of his ineffectiveness claim, has not made a federal claim at all. If that is so, then he has *not exhausted* his federal ineffectiveness claim, which would be unreviewable on federal habeas. For example, in this very case, Everett did not cite Strickland or any other ineffectiveness law in his briefs before the Pennsylvania Superior Court. Indeed, he did not even cite Pennsylvania cases -- he used the word "ineffectiveness" without explanation. App. 65. If the Third Circuit is correct, then Everett did not fairly present a federal claim to the state courts. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (exhaustion rule requires prisoner to "fairly present" his claims to state courts in order to give them a meaningful opportunity to pass upon and correct alleged violations of the prisoner's federal constitutional rights). If that is so, the claim is now defaulted, because there is no remaining avenue of state court review. See Commonwealth v. Chester, 733 A.2d 1242, 1250-51 (Pa. 1999) (PCRA is "sole means of obtaining collateral review and relief" in Pennsylvania); Pa. Cons. Stat. Ann. § 9545(b)(1) (1988) (one-year time limit for PCRA petitions, enacted in 1996), § 9544(a) (no state collateral relief available for claims that have been previously litigated). The same would be true for many Pennsylvania *(continued ...)*

It is plain that the Third Circuit has made a mistake, and that this mistake is important. This Court should grant *certiorari* to reaffirm that the application of the AEDPA standard of review is mandatory under these circumstances.

B. The state courts' resolution of Everett's ineffectiveness claim was a reasonable application of Strickland.

Applying the correct deferential standard, this is not a difficult case: The state courts' rejection of Everett's ineffectiveness claim was plainly reasonable. First, any objection by Everett's trial counsel would have been based on a prediction of future legal developments, and lawyers cannot be ineffective for failing to predict changes in the law. Second, the instructions may well be correct *even under current law*.

The court below held that the trial court's accomplice liability instructions improperly allowed the jury to convict Everett of first degree murder without finding that he had the specific intent to kill; further, the panel held that Everett's counsel was constitutionally obligated to *know* that the instructions were improper. But at the time of Everett's trial in 1980, there was no clearly established law suggesting that the court's accomplice instructions were incorrect. Indeed, at the time, the trial court was not even specifically required to

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prisoners who have raised ineffectiveness claims in state court without explicitly relying upon federal law.

explain that in order to find the defendant guilty of first degree murder as an accomplice, the jury must first find that he shared with the actual killer the specific intent to kill. Such an instruction was not required in Pennsylvania until 1994. See Commonwealth v. Huffman, 638 A.2d 961, 962-63 (Pa. 1994). Counsel is under no constitutional obligation to predict legal developments that will not come to pass for more than a decade. See Lockhart v. Fretwell, 506 U.S. 364, 371-72 (1993) (ineffectiveness claims are subject to "rule of contemporary assessment of counsel's conduct"); Strickland, 466 U.S. at 690 ("a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*") (emphasis added); Buehl v. Vaughn, 166 F.3d 163, 180 (3d Cir.), cert. dismissed, 527 U.S. 1050 (1999) ("a lawyer's failure to perceive the ground for crafting an argument that might have succeeded is very different from the failure to meet the level of competence required by the Sixth Amendment").

The Third Circuit held that Everett's counsel should have objected based on Commonwealth v. Bachert, 412 A.2d 580 (Pa. Super. 1979), *rev'd on other grounds*, 453 A.2d 931 (Pa. 1982). In Bachert -- decided several months before Everett's trial -- the Pennsylvania Superior Court held that a conviction for first degree murder cannot stand without evidence that the defendant acted with the specific intent to kill. The court did not describe the sort of instructions which would be necessary to convey this requirement to the jury. Obviously, Everett's counsel *could have* objected to the instructions based on Bachert; but that is not the point. The issue here is whether counsel was *obligated* to lodge such an objection before any case had addressed the proper form of accomplice instructions under Bachert.

The problem with imposing such a forward-looking requirement on defense counsel is especially acute in this case, because even now -- 22 years after Everett's trial -- the instructions, taken as a whole, may well be correct.

According to Everett, the instructions here violated Huffman because the jury was told that, in order to convict the defendant of first degree murder, it must first find that the defendant "and/or his accomplice" intended to kill. App.7-8. If this were the only relevant instruction, there would be a Huffman problem -- the jury could have convicted Everett while believing that only his accomplice had the requisite intent. But that was *not* the only instruction. The court also separately defined the meaning of "accomplice," and explicitly told the jury that, to be guilty as an accomplice, the defendant *must* have "the intent of promoting or facilitating" the underlying crime. App. 8-9. This language was *approved* by the Pennsylvania Supreme Court in Commonwealth v. Thompson, 674 A.2d 217, 222-23 (Pa. 1996).

There is ample recent authority that an instruction containing both the Huffman charge and the Thompson language is *proper*:

▫ **Commonwealth v. Hannibal, 753 A.2d 1265 (Pa. 2000)**, cert. denied, 532 U.S. 1039 (2001). The jury in Hannibal was told that, in order to convict Hannibal of first degree murder, it must find "that the defendant, his accomplice or co-conspirator [committed the killing] with the specific intent to kill and with malice." Id. at 1271. When considered in isolation, this charge -- like the Huffman language -- suggests that the defendant need not harbor an

intent to kill so long as his accomplice has that intent. Nevertheless, the Pennsylvania Supreme Court held that the instructions, taken as a whole, were *correct* because they also contained the clarifying Thompson language. Here, the Third Circuit distinguished Hannibal because the "bad" instruction was repeated more often in Everett's trial. App. 24. Even if true (and petitioners believe it is not true), trial counsel cannot have been ineffective in 1980 for not making such a distinction.

▫ **Commonwealth v. Howard, 749 A.2d 941 (Pa. Super. 2000)**, appeal denied, 766 A.2d 1244 (Pa. 2001). Howard's jury was instructed that it must determine whether Howard or his accomplice committed the murder, and "*you must determine if the killing was intentional.*" Id. at 956-57. (emphasis added). Once again, this language is close to the Huffman charge. The Superior Court held, however, that the Thompson instructions cured any error.

▫ **Alamo v. Frank, 1999 WL 79659 (E.D. Pa. 1999) (Shapiro, J.).** The trial court's definition of first degree murder instructed the jury to "determine whether the killing was intentional," without specifying whether it must be the defendant, rather than his accomplice, who intended to kill. Id. at *3. The district court noted that this charge violates Huffman, but found that the inclusion of the Thompson instruction cured any error. Id. See also Burroughs v. Domovitch, 2000 WL 122351 (E.D. Pa. 2000) (Shapiro, J.) (state court's rejection of similar instruction was reasonable under AEDPA).

▫ **Commonwealth v. Chester, 587 A.2d 1367 (Pa.)**, cert. denied, 502 U.S. 849 (1991). As part of its definition of first degree murder, the trial court in Chester told the jury

that "specific intent must be found," apparently without specifying that the defendant, rather than his accomplice, must have that intent. Id. at 1384-85. Nevertheless, since the instruction also included the correct Thompson charge, the Pennsylvania Supreme Court held that the instructions as a whole were proper.[6]

A good lawyer might attempt to distinguish these cases. But that is not the point -- this is an ineffectiveness claim that was already rejected by the state courts. Trial counsel was not constitutionally obligated to object to this charge in 1980, years before all of these cases were decided; at the very least, the state court's decision was reasonable.

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[6] The Pennsylvania Supreme Court later opined that the Chester instructions were improper. Commonwealth v. Chester, 733 A.2d 1242, 1253 n.12 (Pa. 1999). But this belated *dicta* proves the petitioners' point. If that Court was unable to make up its mind about these instructions 19 years after Everett's trial, surely counsel was not constitutionally deficient for not making an on-the-spot decision to object.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1662

GERALD EVERETT,
Appellant

v.

JEFFREY A. BEARD, Ph.D. WARDEN
SCI CAMP HILL; THE DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA, LYNN
ABRAHAM; THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA, MIKE FISHER

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*

The petition for rehearing filed by Appellees Jeffrey A. Beard, Ph.D., *et al.*, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: MAY 31 2002

PRECEDENTIAL

May 2, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1662

GERALD EVERETT,
Appellant

v.

JEFFREY A. BEARD, Ph.D. WARDEN
SCI CAMP HILL; THE DISTRICT ATTORNEY
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ABRAHAM; THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA, MIKE FISHER

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 98-cv-05538)
District Judge: Hon. Lowell A. Reed, Jr.

Argued October 30, 2001

Before: SLOVITER, NYGAARD and AMBRO,
Circuit Judges

(Filed May 2, 2002)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Gerald Everett, who drove the automobile carrying two men who robbed and then murdered the proprietor of a grocery store, was convicted of first-degree murder in the Court of Common Pleas of Philadelphia County, Pennsylvania, following a charge that explicitly permitted the jury to impute to Everett the murderer's intent to kill. The Pennsylvania Supreme Court thereafter specifically held such a charge to be reversible error, although its holding followed

inexorably, as the court itself said, from previously enunciated state law. The Supreme Court of the United States has also held that such a charge violates the Due Process Clause of the United States Constitution. The question before us is whether we can do anything about Everett's conviction for first-degree murder following the erroneous charge.

No one alleges that Everett intended that anyone would be shot. Nonetheless, the state trial judge, in charging the jury, said over and over again that Everett could be found guilty of intentional murder if his accomplice intended to cause the death of the victim. Everett's counsel failed to object to this charge. In the appeal before us, Everett challenges the denial of his petition for a writ of habeas corpus claiming violations of his Sixth Amendment right to effective assistance of counsel by virtue of his counsel's failure to object.

II.

FACTS AND EARLIER PROCEEDINGS

On July 17, 1979, Gerald Everett drove Raymond Gray and Robert Burgess to the 1600 block of Kater Street in Philadelphia. During the drive Gray and Burgess said they were going to commit a robbery. Gray and Burgess entered a candy store owned and operated by Jon Jennings and drew guns. Jennings attempted to grab the gun of one of the perpetrators and a struggle ensued. The other perpetrator walked over to Jennings and shot him once in the chest, causing his death. When the two men fled the store, Everett picked them up and drove them away from the scene. Everett admits that he drove the others to and from the store and does not deny that he was an accomplice.

A. *State Court Proceedings*

Everett was charged with first-degree murder, robbery, and criminal conspiracy. At Everett's trial, the prosecutor said in his opening statement:

> At no point in time will I stand here and tell you that this defendant was the actual shooter; at no point in time has or is anyone in this case ever going to say that this defendant was inside Mr. Jennings['] candy store that day. He wasn't. There's no question about that. What we are proceeding on is something called an accomplice theory, accomplice liability and a conspiracy theory.

App. at 45. In his closing statement, the prosecutor said:

> And the one thing I want to stress to you ladies and gentlemen, to convict this man of murder you don't have to find that they discussed shooting anyone beforehand because they obviously didn't. I'm not going to stand here and make a moron out of myself and tell you that they planned to shoot Jon Jennings. They didn't. It happened.

Supp. App. at 598-99.

After the close of trial, the judge charged the jury in pertinent part as follows:

> Now, ladies and gentlemen, I am going to discuss with you the various concepts of homicide.
>
> The defendant in this case is charged with an offense involving what we call criminal homicide, which is

the taking of a human life without justification or excuse. . . .

It is your duty in this case to determine whether the victim, Mr. Jennings, died as a result of an act of the defendant amounting to criminal homicide, or whether the defendant's act *or that of an accomplice* actually caused the criminal homicide, and if so, if it was done by the defendant, as you determine the facts, *and/or an accomplice* of the defendant, if so, whether the killing that resulted therefrom, if you were to so find that it did occur, was murder in the first degree, murder of the second degree, murder of the third degree or voluntary manslaughter.

I shall now instruct you in the elements of each of these offenses. . . .

First: Murder of the first degree: In order to find this defendant guilty of murder in the first degree, you must find that all of the following elements have been established by the Commonwealth beyond a reasonable doubt: One, that the defendant *or an accomplice* caused the death of another person -- in this case Mr. Jennings; that is, you must find that the death of Mr. Jennings would not have occurred but for the alleged acts of the defendant *or his accomplices*, if there are any in this case.

Two: that the killing was intentional. A killing is intentional if it is done by means that are determined to be willful, deliberate and premeditated. . . .

A killing is willful and deliberate if the defendant *and/or his accomplice*, if there were any, consciously

> decided to kill the victim, and it is premeditated if the defendant *or his accomplice*, if there were any accomplices, *possessed a fully informed intent to kill* at the time when the killing took place, even though there need not have been any appreciable amount of time between the time when the defendant *and/or the accomplice*, if any, first conceived the idea of killing, and the time when the action took place.
>
> An intentional killing, as I have defined the term for you, may be found from any expressed words used by the defendant *or his accomplice*, if any exist, or may be implied from the words or conduct of the defendant *or his accomplice*.
>
> It should be noted that if the defendant *or his accomplice*, if any, intentionally used a deadly weapon, such as a gun, with bullets in it, on a vital part of the victim's body, you may infer from this fact, or these facts, that the killing was intentional, and therefore willful, deliberate and premeditated.

App. at 68-71 (emphasis added). In addition, with respect to accomplice liability generally, the judge instructed the jury as follows:

> You may find the defendant guilty of a crime without finding that he personally performed the acts or engaged in the conduct required for the commission of the crime or crimes that I have already mentioned, or even that he was personally present when the crime or crimes were committed.
>
> A defendant is guilty of a crime if he is an accomplice of another person who commits the crime here

> involved, or crimes here involved. Such a defendant is an accomplice if, with the intent of promoting or facilitating the commission of the crime or crimes here involved, he, the defendant, solicits, commands, encourages or requests that the other person or persons involved commit the crime or crimes, or he aids, or agrees to aid, or attempts to aid, or abets in the other person committing or planning the commission of the crime. . . .
>
> You may find the defendant guilty of the crime on the theory that he was an accomplice, as long as you are satisfied, ladies and gentlemen of the jury, beyond a reasonable doubt that the crime or crimes were committed and that the defendant was the accomplice of the person or persons who committed it under the definitions of an accomplice that I just gave you.

App. at 82-83.

Trial counsel failed to object to these instructions. Further, trial counsel complimented the judge on the fairness of these instructions after the jury left the courtroom.

> Mr. Greene [Everett's attorney]: I think probably it would be a waste of time to go over each and every point. You certainly have covered most everything here, and --
>
> The Court: I want to cover everything, not most. . . .
>
> Mr. Greene: -- I would also like to state for the record that I consider your charge eminently fair, and my compliments to the Court for the quality of the charge that it gave to this jury.

App. at 86. During its deliberations, the jury requested an explanation of the different degrees of murder. The trial judge repeated the same instructions. App. at 101-04.

On October 9, 1980, Everett was convicted of first-degree murder, robbery, and criminal conspiracy. He was sentenced to life in prison on February 25, 1981. Represented by the same attorney who represented him at trial, Everett appealed his conviction. His direct appeal to Superior Court failed. *Commonwealth v. Everett*, 445 A.2d 514 (Pa. Super. 1982). The Pennsylvania Supreme Court denied allocatur. *Commonwealth v. Everett*, No. 310 E.D. Alloc. Dkt. 1982.

B. ***State Collateral Proceedings***

Everett then obtained new counsel and, starting on October 4, 1982, filed post-conviction relief petitions in accordance with the Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §§ 9541-46 (2001). Prior to the PCRA hearing, the lawyer withdrew three of the four claims made in the last petition and, on the day of the hearing, withdrew the remaining claim. Relief was denied. Represented by new counsel, Everett appealed arguing that previous counsel had poorly served Everett's interests by withdrawing all his claims. The Superior Court remanded for further proceedings. On remand, Everett raised ineffective assistance of counsel claims. Later, Everett sent this new counsel a letter instructing her to withdraw the PCRA petition, which she did. No further appeal was taken.

In 1988, Everett, represented by yet another attorney, filed a third PCRA petition, which alleged ineffective assistance of trial counsel. This petition was denied. On appeal, the decision was affirmed. *Commonwealth v. Everett*, 573

A.2d 1157 (Pa. Super. 1990). Allocatur was denied. *Commonwealth v. Everett*, 588 A.2d 507 (Pa. 1991).

In August 1995, Everett's present counsel filed a fourth PCRA petition, alleging ineffective assistance at trial, in particular arguing that counsel's failure to object to the definitions for accomplice liability given in the context of the trial court's definition of first-degree murder resulted in a miscarriage of justice. The Court of Common Pleas reached the merits of this issue,[1] holding that the jury charge was proper and that trial counsel was not ineffective. App. at 39-41.

With regard to Everett's ineffective assistance of counsel claims, that court said that:

> With respect to the issue of ineffectiveness, counsel is presumed to be effective and the defendant has the burden of proving ineffectiveness. *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (1990)[.] In order to carry this burden the defendant must first show that the claim which counsel failed to raise has arguable merit and that counsel's failure to raise it was without a reasonable basis which would effectuate the defendant's best interests. *Strickland v. Washington*, 466 U.S. 668 (1984)[.] Second, the defendant must show that counsel's ineffectiveness worked to his prejudice.

App. at 40 (citations omitted). The court stated that Pennsylvania law on jury instructions for first-degree murder

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[1] The Commonwealth does not argue on appeal that the ineffective assistance of counsel claim before us was impermissibly repetitive, and therefore we have not inquired into that issue.

accomplice liability was not settled at the time, and therefore held that Everett's counsel was not ineffective under state law. The Court of Common Pleas did not address Everett's due process claim.

The Superior Court affirmed the denial of PCRA relief in an unpublished memorandum opinion. *Commonwealth v. Everett*, 700 A.2d 1024 (Pa. Super.1997); App. at 33-37. The Superior Court recognized that the Pennsylvania Supreme Court had decided that a charge such as that given by the *Everett* trial judge was improper, citing *Commonwealth v. Bachert*, 453 A.2d 931 (Pa. 1982) (*Bachert II*), and *Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994). App. at 36. In *Bachert II*, the Pennsylvania Supreme Court stated that "it is necessary to look to [the accomplice's] state of mind [which] must be proved beyond a reasonable doubt to be one which the accomplice harbored and cannot depend upon proof of intent to kill only in the principal." 453 A.2d at 935. In *Huffman*, the court relied on and quoted from its *Bachert II* decision for the relevant statement of accomplice liability for first-degree murder, holding that the jury charge that an accomplice may be found guilty of first-degree murder even if he did not have the specific intent to kill was "quite simply, a patently erroneous statement of the law." 638 A.2d at 962 (citing *Bachert II*, 453 A.2d at 935).

Despite this explicit exposition of the relevant law as enunciated by the Pennsylvania Supreme Court, the Superior Court in Everett's case stated that Pennsylvania's general rule of retroactivity does not apply to a case on collateral appeal unless the decision was handed down during the pendency of the defendant's direct appeal. App. at 36-37 (citing *Commonwealth v. Gillespie*, 516 A.2d 1180 (Pa. 1986)). The Superior Court, in affirming the denial of Everett's PCRA petition, concluded that the general rule of retroactivity was not

applicable and that the Pennsylvania Supreme Court's decisions in *Huffman* and *Bachert II* did not apply to Everett's case because they were decided after his trial conviction and appeal.

The Superior Court agreed with the PCRA court that Everett's counsel was not ineffective because Pennsylvania law regarding proper jury instructions for first-degree murder accomplice liability had not been settled. The Superior Court analyzed the claim of ineffective assistance of counsel as follows without citing any federal case law or United States Supreme Court precedent:

> We are first required to determine whether the issue underlying the claim is of arguable merit. *Commonwealth v. Johnson*, 527 Pa. 118, 122, 588 A.2d 1303, 1305 (1991). . . . Even if the underlying claim has merit, the appellant still must establish that the course of action chosen by his counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial. *Id.*; *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

App. at 35-36. The Superior Court did not address Everett's due process claim, which is the constitutional context for asserting that there was ineffective assistance of counsel in a state criminal trial.

Everett sought review by the Pennsylvania Supreme Court. *Commonwealth v. Everett*, 704 A.2d 634 (Pa.1997). Allocator was denied. *Id.*

C. Federal Habeas Corpus Proceedings

Everett filed a Petition for Writ of Habeas Corpus on October 19, 1998. He raised one claim: that trial counsel was constitutionally ineffective for failing to object to the trial court's charge on accomplice liability. On June 18, 1999, the Magistrate Judge assigned to the habeas case issued a report in which she recommended that the petition be denied. App. at 14-28. The Magistrate Judge assumed, without deciding, that the instructions were improper under current law but concluded that (1) the state court's rejection of Everett's ineffectiveness claim had been reasonable because the legal basis for an objection to the accomplice instructions had not yet been developed by the state courts at the time of trial; and (2) to the extent Everett claimed that counsel had been ineffective for not objecting to the same instructions on due process grounds (as opposed to objecting based on state law), the legal grounds for this federal constitutional claim were also undeveloped at the time of trial and therefore this ineffectiveness claim was also meritless.

On May 3, 2000, the District Court issued an order approving and adopting the recommendations of the Magistrate Judge and denying Everett's petition for habeas relief. App. at 12-13. Everett sought permission to appeal this ruling with this court, and we issued a Certificate of Appealability on March 21, 2001.

III.

JURISDICTION AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction over the petition for a writ of habeas corpus pursuant to 28

U.S.C. §§ 2241(c)(3) and 2254(a). This court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

This court applies a plenary standard of review when a "district court dismisses a habeas petition based on a review of the state court record and does not hold an evidentiary hearing," as in this case. *See Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir.), *cert. denied*, 122 S. Ct. 269 (2001) (citing *Zilich v. Reid*, 36 F.3d 317, 320 (3d Cir.1994)). In conducting a habeas analysis, a federal court must presume that the factual findings of both state trial and appellate courts are correct. 28 U.S.C. § 2254(e)(1). A habeas petitioner can overcome this presumption only in the face of clear and convincing evidence to the contrary. *Id.*; *Duncan*, 256 F.3d at 196.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas relief on any claim adjudicated on the merits in state court is precluded unless the adjudication resulted in a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[2] The AEDPA standard of review does not apply unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States. *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir.2000), *cert. denied*, 532 U.S. 924 (2001). When, as here, AEDPA does

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[2] The second exception set forth in the statute covering an adjudication that "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," 28 U.S.C. § 2254(d)(2), is not at issue here.

not apply for that reason, the pre-AEDPA standards of review apply. *Id.* Under that standard, a federal habeas court owes no deference to a state court's resolution of mixed questions of constitutional law and fact; *see Williams v. Taylor*, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring) (citing *Miller v. Fenton*, 474 U.S. 104, 112 (1985)),[3] whereas the state court's factual findings are presumed to be correct unless, inter alia, the state court's findings are not "fairly supported by the record." *Pemberthy v. Beyer*, 19 F.3d 857, 864 (3d Cir.1994) (quoting 28 U.S.C § 2254(d)(8)). But, of course, as the Supreme Court has recognized, "a state court's incorrect legal determination has [never] been allowed to stand because it was reasonable." *Williams*, 529 U.S. at 402 (O'Connor, J., concurring) (quoting *Wright v. West*, 505 U.S. 277, 305 (1992)). Indeed, in her opinion in *Williams*, Justice O'Connor reiterated, "[w]e have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.* (internal quotation omitted).

IV.

DISCUSSION

Everett's habeas petition was filed on October 19, 1998, after AEDPA's effective date. Both the Court of

[3] No single opinion in *Williams* garnered a majority of the court. Parts I, III and IV of Justice Stevens' opinion garnered a six-judge majority. *Williams*, 529 U.S. at 367-374, 390-399. Part II of Justice O'Connor's opinion (with the exception of a footnote) garnered a five-judge majority. *Williams*, 529 U.S. at 402-413 (interpreting the clause of 28 U.S.C. § 2254(d)(1) that refers to "contrary to, or involved an unreasonable application of, clearly established Federal law"). Six justices agreed that the *Strickland* test governed the claim of ineffective assistance of counsel in Williams' habeas petition.

Common Pleas and the Superior Court of Pennsylvania reached the merits of Everett's underlying state law claim of ineffective assistance of counsel based on failure to object to the jury instructions on first-degree murder accomplice liability. Were we reviewing Everett's state law claim, it would therefore be assessed under the standards contained in AEDPA. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

With respect to both Everett's state law claim and his federal due process claim, the threshold question is whether the habeas petitioner seeks to apply a rule of law that was clearly established by the United States Supreme Court at the time his or her state-court conviction became final. Everett seeks relief due to ineffective assistance of counsel, which is squarely governed by *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test qualifies as "clearly established Federal law, as determined by the Supreme Court." *Williams*, 529 U.S. at 391; *id.* at 413 (O'Connor, J., concurring).

Applying *Strickland*, this court recently has held that in order to establish a claim of ineffective assistance of counsel,

> the petitioner must establish both that his counsel's performance was deficient and that the deficient performance prejudiced his trial to the extent that it undermined confidence in the trial's outcome. The standard by which we judge deficient performance is an objective standard of reasonableness, viewed to the extent possible from the attorney's perspective at the time, without "the distorting effects of hindsight."

Duncan v. Morton, 256 F.3d 189, 200 (3d Cir. 2001) (citing and quoting *Strickland*, 466 U.S. at 687-90)[]. To demonstrate prejudice, the habeas petitioner must show a

"reasonable probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

In addressing the reasonableness of an attorney's representation, reviewing courts must be deferential in their scrutiny and scrupulously avoid the distortions of hindsight by viewing performance from counsel's perspective at the time. *Id.* at 689-90. Furthermore, claimants must identify specific errors by counsel, and the court must indulge a strong presumption that counsel's conduct was reasonable. *Id.* at 690.

Everett argues that his trial counsel did not meet the *Strickland* standard for an effective counsel given then-current Pennsylvania law regarding accomplice liability for first-degree murder and then-current federal due process jurisprudence. Further, he argues that counsel's failure to act as effective counsel was directly responsible for his conviction for first-degree murder. We turn to the searching review we must give to Everett's federal due process claim.

A. ***Federal due process claim***

Everett argues that his trial counsel was ineffective for failing to raise an objection to the jury instructions based on both due process and Pennsylvania law. Everett's claim under the *Strickland* ineffective assistance standard was addressed by neither the Court of Common Pleas nor the Superior Court of Pennsylvania. We will therefore review de novo whether Everett's trial counsel should have objected to the jury instructions.

In addressing the issue of ineffective assistance of counsel, the parties have focused primarily on the question

whether, at the time of Everett's trial, it was established under federal law and/or Pennsylvania law that a judge must instruct the jury that in order to find a defendant charged as an accomplice guilty of first-degree murder, it must find that the defendant had the intent to kill the victim. *Strickland* teaches that the standard by which counsel is to be judged is that of "a reasonably competent attorney," 466 U.S. at 687 (quotation omitted), in criminal cases, and that even if counsel has not met that standard s/he will not be labeled constitutionally ineffective unless the defendant has been prejudiced. *Id.* at 691.

Of course, the state of the law is central to an evaluation of counsel's performance at trial. A reasonably competent attorney patently is required to know the state of the applicable law, so the parties' focus upon the state of the law at the time of Everett's trial is not misplaced.

At the time of Everett's conviction, the primary relevant case on due process for a criminal defendant was *In re Winship*, 397 U.S. 358 (1970). In that case, the Supreme Court stated: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. Several years later and still before Everett's trial, the Court applied the principle of *Winship* to jury instructions, holding that jury instructions that suggest a jury may convict without proving each element of a crime beyond a reasonable doubt violate the constitutional rights of the accused. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (citing *Winship*, 397 U.S. at 364). Clearly, a reasonably competent lawyer in 1980 would have carefully scrutinized jury instructions to make sure that the instructions

required proof beyond a reasonable doubt of each element of a crime.

Because Everett was charged with murder under state law, we must necessarily reference the elements of accomplice liability for first-degree murder under Pennsylvania law in 1980 in order to evaluate the effectiveness of Everett's trial counsel. According to Pennsylvania law, "[a] person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being," 18 Pa. Cons. Stat. § 2501 (1973); "[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing," 18 Pa. Cons. Stat. § 2502(a) (1974); and an intentional killing is "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." *Id.* § 2502(d).

This law was interpreted by the Pennsylvania Superior Court in a decision filed on October 19, 1979, eleven months prior to Everett's conviction. *Commonwealth v. Bachert*, 412 A.2d 580 (Pa. Super. 1979) (*Bachert I*), *aff'd in part and rev'd in part on other grounds*, 453 A.2d 931 (Pa. 1982). Among the issues in *Bachert* was whether an accomplice had to have the specific "deliberate, willful and premeditated" intent to kill in order to be found guilty of first-degree murder or whether this intent could be transferred to an accomplice. *Bachert I*, 412 A.2d at 583. Pennsylvania Supreme Court Justice Robert Nix, sitting by designation on the Superior Court and writing for that court in *Bachert I*, held that "[s]ince first degree murder requires the existence of a specific intent to take life, the evidence must show that the shared intent included the design to take the life of the victim." *Id.* This decision applied a well-established principle of Pennsylvania law and found that the case before it was closely analogous to prior cases that had

considered the principle. The decision in *Bachert I* did not impose new obligations on the prosecution in first-degree murder cases.

The *Bachert I* court discussed Pennsylvania Supreme Court cases where defendants were charged with first-degree murder on an accomplice theory. *Id.* at 583-84. In each of the cases cited, the court had addressed the necessity of finding that thedefendant had the requisite specific intent before finding the defendant guilty of first-degree murder via accomplice liability. In *Commonwealth v. Smith*, 391 A.2d 1009 (Pa. 1978), decided two years prior to Everett's conviction, the Supreme Court of Pennsylvania sustained a finding of first-degree murder as to an accomplice because the evidence provided a basis for the jury to find that he had formed a specific intent to assist the taking of the life of the deceased. *Bachert I*, 412 A.2d at 584 (discussing the *Smith* decision). The facts that proved the requisite intent for first-degree murder in Smith were: (1) Smith armed himself for the express purpose of seeking out the victim and shooting him; (2) Smith heard a member of his group state, "Who do I shoot;" (3) Smith himself asked, "Which one is Bruce?" (the victim); and, (4) during the shooting Smith had his weapon drawn and discharged it several times. *Id.* at 584.

The *Bachert I* court also discussed *Commonwealth v. Hampton*, 341 A.2d 101 (Pa. 1975), decided five years before Everett was convicted. *Bachert I*, 412 A.2d at 584. In *Hampton*, the defendant twice aimed a gun at the victim but failed to shoot. He gave the gun to an accomplice who said, "Give me the gun. I'll show you how it's done." *Hampton*, 341 A.2d at 103. The defendant's accomplice then shot the victim to death. *Id.* The Supreme Court of Pennsylvania affirmed the jury conviction of first-degree murder after finding that Hampton had exhibited the requisite intent to kill

the victim. *Bachert I*, 412 A.2d at 584. Applying the analysis of the Pennsylvania Supreme Court in these cases, the Pennsylvania Superior Court reversed Bachert's conviction.

In 1982, the Pennsylvania Supreme Court reversed part of the Superior Court's 1979 decision in *Bachert I. Commonwealth v. Bachert*, 453 A.2d 931 (Pa. 1982) (*Bachert II*).[4] Importantly, however, the Pennsylvania Supreme Court agreed with the holding of the Superior Court of significance to the present case. In other words, the Supreme Court of Pennsylvania disagreed with the application of the rule of law, but not with the rule of law itself.

Superior Court decisions are (and, in 1980, were) the law of the Commonwealth. As the Pennsylvania Supreme Court has held,

> it is well established that a Superior Court decision which has not been overruled or reversed is binding authority on this Commonwealth's trial courts. *In re Townsend's Estate*, 349 Pa. 162, 36 A.2d 438 (Pa. 1944). In *In re Townsend's Estate*, we stated that "a lower court has no right to ignore the latest decision of the Superior Court of this Commonwealth on an issue which has been squarely decided. Until that

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[4] The Pennsylvania Supreme Court disagreed with the Superior Court about whether the particular evidence offered by the Commonwealth was sufficient to prove the accomplice's state of mind. The Superior Court thought that certain statements made by Bachert did not bear on whether he had "the requisite intent to kill the victim at the time of the killing by [the principal]." *Bachert I*, 412 A.2d at 584. In contrast, the Supreme Court held that these statements were sufficient to support the inference that Bachert intended to facilitate the murder. *Bachert II*, 453 A.2d at 936.

> decision should be overruled by the Superior Court itself or overruled by the Supreme Court, it is still the law of this Commonwealth. . . ." *Id.* at 168, 36 A.2d at 441.

Keblish v. Thomas Equip., Ltd., 660 A.2d 38, 42-43 (Pa. 1995). Thus, although *Bachert I* had been appealed to the Pennsylvania Supreme Court at the time of Everett's trial, it was the Pennsylvania Superior Court's decision in *Bachert I* that represented the state of Pennsylvania law on the elements needed to convict an accomplice of first-degree murder.

Everett argues that the instructions that the trial court gave to the jury improperly relieved the Commonwealth of the burden of proving the most critical element of state law for accomplice liability for first-degree murder, i.e., the specific intent to kill, and therefore the charge violated due process. The Commonwealth in turn argues that the jury instructions were not deficient because the trial court had correctly instructed the jury on accomplice liability generally, which it contends, in effect, cured any error in the instructions for first-degree murder. The Commonwealth argues that the jury instructions should be read as a whole, and in particular that jury instructions on accomplice liability and first-degree murder should be read together to evaluate the propriety of the instructions. *See, e.g., Commonwealth v. Hannibal*, 753 A.2d 1265, 1269-70 (Pa. 2000), *cert. denied*, 532 U.S. 1039 (2001) (assessing jury instructions regarding accomplice liability for first-degree murder "as a whole").

There can be no dispute that the propriety of jury instructions is to be determined by assessing the entire set of instructions. That proposition has been established by both the Supreme Court, *see, e.g., Victor v. Nebraska*, 511 U.S. 1,

5 (1994), and by this court, *see, e.g., United States v. Isaac*, 134 F.3d 199, 203 (3d Cir.1998). However, the assessment must be made on a case-by-case basis. The mere fact that the law was correctly stated in one part of the charge will not automatically insulate the charge from a determination of error.

In *Hannibal*, on which the Commonwealth places much emphasis, the jury was instructed that to find the defendant guilty of first-degree murder, it must be satisfied that "the defendant, his accomplice or co-conspirator [killed] with the specific intent to kill and with malice." 753 A.2d at 1270. Although the jury was also instructed on accomplice liability with incorrect words similar to those used by Everett's trial judge when he instructed the jury on accomplice liability, the Pennsylvania Supreme Court noted that the trial court "consistently and in understandable language referred to the need to consider whether each individual in the case possessed the requisite specific intent to kill." *Id.* at 1271. It appears that the *Hannibal* court believed that the trial court's instructions on accomplice liability sufficed to counterbalance the mistaken instructions on first-degree murder.

In contrast, at Everett's trial the judge offered the instruction on accomplice liability once, but instructed the jury twelve times (six times in the actual jury instructions and six times in response to a query from the jury during deliberations) that it could convict Everett of first-degree murder based on the principal's intent to kill without regard to Everett's own intent. The error cannot be either erased or minimized, as the Commonwealth suggests.

The Commonwealth's principal argument is that Pennsylvania law regarding jury instructions for accomplice liability for first-degree murder was not clearly established at

the time of Everett's trial and therefore the trial judge was not required to explain to the jury that to find an accomplice guilty of first-degree murder, it must find that the accomplice shared the killer's specific intent to kill. The Commonwealth contends that Pennsylvania did not clearly establish this rule until *Commonwealth v. Huffman*, 638 A.2d 961, 962-63 (Pa. 1994), fourteen years after Everett's trial. It contends that *Bachert I* is inapposite here because *Bachert I* did not involve a challenge to a jury instruction on accomplice liability but rather involved a claim that the evidence was insufficient to prove that the defendant was guilty as an accomplice.

Everett takes issue with the Commonwealth's view of the applicable Pennsylvania law at the time. He argues that even though the Superior Court's opinion in *Bachert I* did not directly discuss jury instructions but concerned the sufficiency of the Commonwealth's evidence that Bachert committed first-degree murder, questions of sufficiency necessarily require consideration of the elements of the crime and the need to prove each of the elements beyond a reasonable doubt.

Further, Everett argues, contrary to the Commonwealth, that *Huffman* did not establish new law but merely articulated the law that existed at the time of *Bachert I* and described therein. He contends that Pennsylvania law since the enactment of the 1972 Criminal Code required proof of specific intent to kill on the part of an accomplice, and cites in support *Commonwealth v. Wayne*, 720 A.2d 456 (Pa. 1998). Indeed, in *Wayne*, the Pennsylvania Supreme Court, after discussing *Bachert II* and *Huffman* on the required intent to kill by an accomplice, held that the state legislature, in "delineat[ing] the elements distinguishing the various degrees of homicide," clearly did not intend that an accomplice "could be culpable for first degree murder without proof

that [s/he] shared the specific intent to kill." *Id.* at 464. Wayne confirms Everett's contention that since the legislature drafted the law on first-degree murder, 18 Pa. Cons. Stat. § 2502 (drafted 1972; revised 1974), Pennsylvania law has clearly required that for an accomplice to be found guilty of first-degree murder, s/he must have intended that the victim be killed. *See also Commonwealth v. Chester*, 733 A.2d 1242, 1253 n.12 (Pa. 1999) ("The holding of *Huffman* . . . did not create new law.").

Moreover, the decisive issue here is not whether the trial court's instruction failed to accurately set forth the state of Pennsylvania law in 1980 but whether Everett's counsel was ineffective for failing to object to the instructions. A competent defense lawyer prepared for trial of an accomplice for first-degree murder in 1980 should have known about *Bachert I*, as it was filed well before Everett's trial, and should have, on that basis, demurred to the Commonwealth's case, saying that Everett simply could not be convicted of first-degree murder given the Commonwealth's proffered evidence because the Commonwealth did not claim that Everett had the requisite mental state.

Even if the Superior Court's decision in *Bachert I* was not Pennsylvania's final word on the state of the law in Pennsylvania, by itself a questionable proposition, an effective lawyer would have noted that it was authored by a justice of the Pennsylvania Supreme Court, sitting by designation, and thereby been on notice that he should object to jury instructions that were directly contrary to the latest applicable Pennsylvania appellate court decision.

Counsel's status as a reasonably competent attorney is not strictly confined to the law as enunciated by the decisions of the jurisdiction's highest court. More is expected from a

reasonably competent attorney, especially one in a major criminal case, than merely to parrot Supreme Court cases. A law student could do as much. Instead, a reasonably competent attorney will have reason to rely on authority, especially favorable authority, even if it had not yet been enunciated by the United States Supreme Court or the state's supreme court.

Finally, a reasonably competent lawyer at the time of Everett's trial in 1980 should have noted the glaring lack of evidence that Everett had the requisite intent to kill and should have objected to the charge as inconsistent with due process, as enunciated in *Winship* and *Sandstrom*. We thus agree with Everett that his trial counsel did not perform as effective counsel should have.

Strickland involved a claim of ineffectiveness based on "conduct of . . . counsel at and before [the habeas petitioner's] sentencing proceeding," 466 U.S. at 698, not a claim based on counsel's trial decisions. The Supreme Court case that applies the *Strickland* ineffective assistance of counsel analysis to evaluate counsel's decisions at trial is *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Counsel for the defendant convicted of rape had failed to file a timely motion for the suppression of the bed sheet that had been illegally seized. Counsel's failure to file a motion to suppress was not due to trial strategy considerations, but was due to counsel's ignorance because he had failed to conduct any pretrial discovery. *Id.* at 369. The Supreme Court noted that *Strickland* required "assess[ing] counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Id.* at 386 (quoting *Strickland*, 466 U.S. at 690). The Supreme Court agreed with both the district court and this court that "counsel's performance fell below the level of reasonable professional

assistance," *id.*, and agreed that the case should be remanded for a determination of prejudice. *Id.* at 390.

While the Supreme Court in *Strickland* intentionally did not "establish mechanical rules" for determining whether counsel was ineffective, 466 U.S. at 696, certain general principles can be noted with respect to counsel's obligation as to the charge. Counsel must not file frivolous objections but at the same time counsel must not neglect to suggest instructions that represent the law that would be favorable to his or her client supported by reasonably persuasive authority. Every trial judge knows that a competent criminal lawyer will find a fruitful source of potentially favorable instructions not only in decisions of the highest court of the jurisdiction but certainly in decisions of the intermediate appellate court of that very jurisdiction. Everett's counsel failed to do that at his trial.

Other courts of appeals that have concluded that trial counsel's performance was ineffective in failing to propose accurate instructions or to object to erroneous instructions have then granted a habeas petition. The Court of Appeals for the Fourth Circuit observed that "an erroneous jury charge may form the basis of a habeas petition, either independently or in conjunction with an ineffective assistance of counsel claim, where the instruction 'so infected the entire trial that the resulting conviction violates due process' by rendering the trial fundamentally unfair." *Luchenburg v. Smith*, 79 F.3d 388, 391 (4th Cir.1996) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). In that case, the Fourth Circuit granted a habeas petition due to the ineffectiveness of petitioner's counsel for failing to request an expanded jury instruction that more accurately described state law. *Id.* at 393. More recently, the Court of the Appeals for the Sixth Circuit, in a post-AEDPA habeas case, found trial counsel ineffective for

failure to object, on both constitutional and evidentiary grounds, to jury instructions on the consideration of pre-arrest silence as substantive evidence. *Combs v. Coyle*, 205 F.3d 269, 286 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000).

Several other of our sister circuits have granted habeas petitions on the grounds that counsel was ineffective for failing to object to or to propose jury instructions. *See, e.g., Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001) (granting habeas on ineffective assistance grounds due to counsel's failure to object and thus to prompt a curative cautionary jury instruction); Freeman v. Class, 95 F.3d 639, 642 (8th Cir. 1996) (granting habeas on ineffective assistance grounds due to counsel's failure to request cautionary instructions on accomplice testimony); United States v. Span, 75 F.3d 1383, 1389-90 (9th Cir.1996) (finding ineffective assistance because counsel failed to request a significant jury instruction); *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (finding ineffective assistance due, inter alia, to "failure to propose, or except to, jury instructions"); *Gray v. Lynn*, 6 F.3d 265, 271 (5th Cir. 1993) (finding ineffectiveness because counsel failed to object to erroneous jury instructions).

Everett's counsel was deficient for not challenging the jury instructions on accomplice liability for first-degree murder.[5] Countless times we have seen lawyers object to

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[5] As an additional basis to show that Everett's trial counsel was not ineffective, the Commonwealth notes that he did cite *Bachert I* in his direct appeal in support of his argument that the evidence offered at trial was insufficient to support Everett's conviction. Supp.App. at 709. At oral arguments, Everett's current counsel conceded that Everett's trial counsel did mention *Bachert I*

(Continued)

instructions on patently flimsy grounds. This was not a flimsy ground.

B. ***Prejudice***

We have concluded that Everett's counsel was deficient for failing to object to the jury instructions. To find ineffective assistance of counsel, it is also necessary to find prejudice, as the Supreme Court noted in *Kimmelman*, 477 U.S. at 387. In some cases, that may require a remand, but the record here is clear as to Everett's prejudice.

Everett was convicted of first-degree murder despite the fact that no evidence was adduced at trial that he possessed the requisite intent to kill the victim. Additionally, the prosecutor's trial strategy was based on the premise that even though Everett was not in the store, and even though he had not at any time discussed with his conspirators the use of force, much less deadly force, he could be held liable simply

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(Continued)

in his appeal, although the appellate court did not address any of the issues relating to *Bachert I*. *Commonwealth v. Everett*, 445 A.2d 514 (1982). Everett's current counsel noted, however, that (a) Everett's trial counsel did not object to the jury instructions and did not refer to *Bachert I* or the relevant principle from it at the crucial moment and (b) when Everett's counsel did cite *Bachert I* in his brief on direct appeal, he "got it wrong." While the trial counsel's characterization of *Bachert I* in his brief for the direct appeal is not obviously incorrect, from the context in which he cites it and the brief discussion he gives to it, it seems clear that Everett's counsel did not adequately appreciate the strength and relevance of *Bachert I*. In any event, that *Bachert I* was cited in Everett's brief on direct appeal does not by itself undermine Everett's claim of ineffective assistance of counsel for failing to object to the incorrect instructions at trial.

because he participated in the crime by driving the getaway car. This is evident in the prosecutor's closing remarks where he said, "I'm not going to stand here and make a moron out of myself and tell you that they planned to shoot Jon Jennings. They didn't. It happened." App. at 61. Everett's counsel's failure to object to the jury instructions allowed for the conviction of Everett based on the specific intent of the actual killers themselves.

The standard established in *Strickland* for prejudice is whether there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. In this case, but for the failure of counsel to object to the jury instructions, there is more than a reasonable probability that Everett would not have been convicted of first-degree murder because there was no evidence that he possessed the requisite specific intent to kill. We recognize that the Pennsylvania courts rejected Everett's claim of ineffective assistance of counsel on appeal of the denial of Everett's PCRA petition. But they did that on the basis of their interpretation of Pennsylvania state law.[6] We, on the other hand, are applying federal due process which encompasses the requirement of effective assistance of counsel. On that issue, we need not defer to the state courts. We note, once again, that the state courts did not discuss the due process issue.

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[6] Not only are these state court decisions in tension with later state court decisions, in particular *Wayne* and *Chester*, an inconsistency about which there is little we can do, *see, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (interpretation of state law must be left to the state courts), but the state courts addressed the question of whether *Bachert II* could be applied retroactively to Everett's case and simply ignored *Bachert I*.

In light of our conclusion that under *Strickland* trial counsel was ineffective for failing to raise objections to the jury instructions, we do not need to reach the question of whether Everett's trial counsel was ineffective under state law for failing to raise state law objections to the jury instructions.

V.

CONCLUSION

Everett's counsel was ineffective by virtue of his failure to press the issue of whether an accomplice who did not have the intent to kill can be found guilty of first-degree murder based on accomplice liability, generally, and, in particular as this issue related to the instructions the trial court gave to the jury. Everett was clearly prejudiced by his counsel's ineffectiveness. Everett is serving a life sentence for first-degree murder despite jury instructions that failed to charge, in accordance with the law of both Pennsylvania and the United States, that such a conviction requires proof of an accomplice's intent to kill and despite the Commonwealth's failure to prove that Everett had an intent to kill or even claimed that he did. This must be an instance such as that referred to in *Duncan*, citing *Strickland*, where counsel's deficient performance "undermine[s] confidence in the trial's outcome." *Duncan*, 256 F.3d at 200 (citing *Strickland*, 466 U.S. at 687).

The judgment of the District Court will therefore be reversed to the extent that it denied Everett's petition for habeas relief with regard to his conviction for first-degree murder. We will remand this matter to the District Court for further proceedings consistent with this opinion.

A True copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APS-136 March 15, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. **00-1662**

GERALD EVERETT

vs.

JEFFREY A. BAIRD [SIC], ET AL.

(E.D. Pa. Civ. No. 98-cv-05538)

Present: SLOVITER, BARRY and AMBRO,
CIRCUIT JUDGES

Submitted are:

1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

2) Appellees' objection to application for certificate of appealability in the above-captioned case.

Respectfully,

Clerk

MMW/LCS/je

ORDER

The foregoing request for a certificate of appealability is granted with respect to the question whether trial counsel was ineffective for failing to object to the jury instructions concerning the charge of first-degree murder.

By the Court,

/s/ Maryanne Trump Barry
Circuit Judge

Dated: MAR 21, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD EVERETT	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFREY A. BEARD, et al.	:	NO. 98-5538

ORDER

ENTERED MAY 4, 2000

AND NOW, this 3rd day of May, 2000, upon independent and *de novo* consideration of the petition for habeas corpus of petitioner, the response thereto, and the entire record before the magistrate judge, review of the report and recommendation of the magistrate judge (Document No. 16), and further review of the objections of petitioner to the report and recommendation, the answer of respondent thereto, and petitioner's response and supplemental memorandum, it is hereby ORDERED that:

1. The objections of petitioner are OVERRULED;

2. The report and recommendation is APPROVED and ADOPTED;

3. Having considered as well the recent decisions of the Supreme Court of the United States in *Williams v. Taylor*, 120 S.Ct. 1479 and 1495 (April 18, 2000), it is concluded herewith that the report and recommendation of the magistrate judge herein is not effected by or inconsistent with these recent decisions;

4. The petition for habeas corpus is DENIED; and

5. Because the petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253, a certificate of appealability is not issued.

/s/
LOWELL A. REED, JR., S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD EVERETT	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFREY A. BEARD, *et al.*	:	NO. 98-5538

REPORT AND RECOMMENDATION

ENTERED: 6-18-99
CLERK OF COURT

DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

June 17, 1999

Presently before the court is *pro se* petition for a writ of habeas corpus filed by a state prisoner pursuant to 28 U.S.C. § 2254. On October 9, 1980, after a jury trial in the Court of Common Pleas for Philadelphia County, the petitioner was convicted of first degree murder, robbery and conspiracy. The petitioner had driven two other individuals to a candy store located at 16th and Kater Streets in Philadelphia on July 17, 1979. The other individuals entered the store and, during the course of the ensuing robbery, the owner was killed. The petitioner was subsequently sentenced to a life term of incarceration. He is presently serving that sentence at the State Correctional Institution-Camp Hill.

The petitioner claims that trial counsel was ineffective for failing to object to the instructions given to the jury which concerned the mens rea required to properly convict a person of first degree murder as an accomplice. The petitioner contends that, during his charge to the jury, the trial

judge repeatedly and erroneously instructed the jury that the petitioner could be convicted of first degree murder as an accomplice of the actual killer if the petitioner or the actual killer had the specific intent to kill the victim. According to the petitioner, Pennsylvania law at the time of his trial required that, to convict an accomplice of first degree murder, the accomplice, in his own right, had to have formed the specific intent to kill the victim. Because, in the petitioner's view, such was required by Pennsylvania law, the trial judge's failure to so charge misstated or omitted an element of first degree murder and thereby caused the jury instructions given to violate his constitutional right to due process.

The respondent District Attorney does not contend that the petitioner has failed to exhaust his state remedies claim or that he has committed a procedural default which would prevent the court from addressing the merits of the petitioner's claim. For this reason, the court will address the merits of the petitioner's claim. The District Attorney also does not argue that, under the present state of Pennsylvania law, the jury instructions which the petitioner challenges could be sustained. For this reason, the court will assume that the challenged jury instructions are, as a matter of current Pennsylvania law, erroneous. The District Attorney also does not dispute that, under present law, the jury instructions challenged by the petitioner eliminate the Commonwealth's burden to prove an element of first degree murder and, thus, do violate the petitioner's right to due process. For this reason, the court will assume that the jury instructions challenged by the petitioner constitute a violation of his right to due process. However, the claim the petitioner raises here is not whether the jury instructions given at his trial are inconsistent with the requirements of Pennsylvania law or whether they violate his right to due process. Instead, his claim is that trial counsel was ineffective for failing to object to the

instructions that were given. As will be seen, in addressing this question the court must consider the state of the law at the time trial counsel acted.

The petitioner's claim of ineffective assistance of counsel must be evaluated against the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense," by, "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.* at 694, but it is less than a preponderance of the evidence. *Id.* at 693, 694. If the petitioner fails to satisfy either part of the *Strickland* test, there is no need to evaluate the other part as his claim will fail. *Id.* at 697.

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this court was free to disregard the analysis employed by the state courts when they considered the merits of the petitioner's claims. However, that is no longer the case. The AEDPA now requires federal habeas courts to afford some deference to state court determinations of federal constitutional claims. The deferential standard of review required by the AEDPA is as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

In *Matteo v. Superintendent SCI Albion*, 171 F.3d 877 (3d Cir. 1999), the court summarized how federal courts should apply 28 U.S.C. § 2254(d)(1)[1]:

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[1] In *Matteo*, the Third Circuit did not address how 28

(Continued)

> First, the federal habeas court must determine whether the state court decision was "contrary to" Supreme Court precedent that governs the petitioner's claim. Relief is appropriate only if petitioner shows that "Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." *O'Brien [v. Dubois*, 145 F.3d 16, 24-25 (1st Cir. 1998)]. In the absence of such a showing, the federal habeas court must ask whether the state court decision represents an "unreasonable application of" Supreme Court precedent: that is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified. If so, then the petition should be granted.

Matteo, 171 F.3d at 891.

The court explained that, when engaging in "contrary to" analysis, the habeas court must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim. *Id.* at 888. The habeas petitioner need not cite factually identical Supreme Court precedent. *Id.* Rather, the critical inquiry is whether the Supreme Court caselaw establishes a rule which "can fairly be said to require a particular result in a particular case." *Id.* at 889 (quoting *O'Brien v. Dubois*, 145 F.3d at 25). If the habeas court determines that the decision of the state court was not "contrary to" Supreme Court precedent, "either because the state court decision complies with the Supreme Court rule governing the claim, or because no such rule has been

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(Continued)

U.S.C. § 2254(d)(2) should be applied. Neither party has raised the question in this case and so the court will only address the applicability of 28 U.S.C. § 2254(d)(1).

established," then the court must engage in "unreasonable application of" analysis. *Id.* at 889.

The court noted that "unreasonable application of" analysis does not permit the habeas court to grant the writ "merely because it disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result." *Id.* (quoting *O'Brien*, 145 F.3d at 25). The reason for this restriction is that de novo review of federal constitutional claims is barred by 28 U.S.C. § 2254(d)(1). *Id.* at 889. The court held that:

> the appropriate question is whether the state court's application of Supreme Court precedent was objectively unreasonable. The federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.

Id. at 889-90. When engaging in "unreasonable application of" analysis, the habeas court may consider the decisions of the inferior federal courts. *Id.* at 890. The court went on to explain that the "unreasonable application of" standard is necessarily imprecise:

> the "unreasonable application of" standard admits of no a fortiori definition: "None of this answers the question when a departure is so great as to be 'unreasonable,' for that question lacks an abstract answer. . . . . Questions of degree -- like questions about the proper use of 'discretion' -- lack answers to which the labels 'right' and 'wrong' may be attached."

Id. at 891 (quoting *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

With this teaching in mind, the court will consider whether the state courts' decisions concerning trial counsel's alleged ineffectiveness was either "contrary to" or an "unreasonable application of" federal law as established by the Supreme Court. The court notes that, if the petitioner fails to show that the state courts' decisions were "contrary to" or an "unreasonable application of" federal law with respect to either part of the *Strickland* test, his claim must fail. *Strickland*, 466 U.S. at 697.

The petitioner's claim was addressed in the June 12, 1996 decision of the PCRA[2] court as follows:

> Petitioner relies upon *Commonwealth v. Bachert*, 499 Pa. 398, 453 A.2d 931 (1982) and *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994) for the proposition that trial counsel was ineffective for not objecting to the court's charge. This reliance is misplaced. Petitioner was tried and convicted in October of 1980. Neither case had been decided at the time of the trial in this case and trial counsel cannot be held to be ineffective for failing to raise an issue which was not law at the time.
>
> Further, in *Commonwealth v. Gillespie*, 512 A.2d 349, 516 A.2d 1180 (1986) the Pennsylvania Supreme Court held that the general rule of

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[2] The acronym "PCRA" refers to Pennsylvania's Post Conviction Relief Act, which is codified at 42 Pa.C.S.A. §§ 9251, *et seq.*

> retroactivity does not apply to any case on collateral appeal unless that decision was handed down during the pendency of the defendant's direct appeal. Petitioner's direct appeal was completed in August of 1982 when *allocatur* was denied by the Pennsylvania Supreme Court. *Bachert*, supra was filed on December 17, 1982. Accordingly, neither case is not [sic] applicable to this case and petitioner is not entitled to a new trial on this basis.

Commonwealth v. Everett, August Term 1979 No. 0440, slip op. at 3 (Phila. Co. C.C.P. June 12, 1996).

The petitioner appealed the PCRA court's denial of relief and his claim was addressed by the Superior Court of Pennsylvania as follows:

> In 1994, the Pennsylvania Supreme Court decided the case of *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994). In *Huffman*, the Court held that when giving a jury charge on accomplice liability for a crime involving specific intent to kill, the jury must consider the mental state of the accomplice and not depend only upon proof of the principal's intent to kill. *Huffman*, *supra*; *see also Commonwealth v. Bachert*, 499 Pa. 398, 453 A.2d 931 (1982). As the Honorable David Savitt has has [sic] cogently explained in his opinion, the *Huffman* case was decided in 1994, and the *Bachert* decision was filed on December 17, 1982, both *after* the appellant's trial, conviction, and completion of direct appeal. The general rule of retroactivity, therefore, is not applicable. *See Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986) (general rule of retroactivity does not apply to any case on collateral

> appeal unless the decision was handed down during the pendency of the defendant's direct appeal). *See also Commonwealth v. Beasley*, --- Pa. ---, 678 A.2d 773 (1996) (counsel cannot be found ineffective at time of trial for failing to raise a meritless objection at time of trial or for failing to predict legal developments); *Commonwealth v. Fahy*, 537 Pa. 533, 645 A.2d 199 (1994); *Commonwealth v. Yarris*, 519 Pa. 571, 605-06, 549 A.2d 513, 531 (1988); *Commonwealth v. Anderson*, 501 Pa. 275, 461 A.2d 308 (1983).
>
> Judge Savitt properly disposed of this claim. We, therefore, affirm the order deny[ing] post-conviction relief.

Commonwealth v. Everett, No. 02237 Philadelphia 1996, slip op. at 4-5 (Pa. Super. June 17, 1997). Thereafter, the Pennsylvania Supreme Court denied the petition for allowance of appeal in a one-sentence, per curiam order.

The PCRA court gave two reasons for denying the PCRA petition. Its first reason was based upon the merits of the petitioner's ineffectiveness claim and was that the Pennsylvania Supreme Court decisions in *Bachert*[3] and

[3] The petitioner argues that the PCRA court (and the Superior Court) should have considered whether the jury instructions in his case were deficient under the Pennsylvania Superior Court's decision in *Bachert* rather than focusing on the Supreme Court's decision in *Bachert*. The Superior Court's decision in *Bachert* was rendered almost two years before the petitioner's trial and the Superior Court held, as the Supreme Court would later hold, that an accomplice could only be culpable of first degree murder if the accomplice had the specific intent to kill. *Commonwealth v.*

(Continued)

Huffman had been decided until after his trial and so trial counsel should not be found to have rendered ineffective assistance. The second reason was that, based upon a point of Pennsylvania law, neither the *Bachert* nor *Huffman* decisions could be retroactively applied to the petitioner's case. The Superior Court appears to have provided two explanations for affirming the PCRA court. It stated that, under Pennsylvania law, neither the *Bachert* nor *Huffman* decisions could be retroactively applied to the petitioner's case. In the course of supporting its decision, the Superior Court also cited *Commonwealth v. Beasley*, 678 A.2d 773 (Pa. 1996) which it understood to stand for the proposition that trial counsel cannot be found ineffective for failing to raise a meritless objection at time of trial or for failing to predict

(Continued)

Bachert, 412 A.2d 580, 583 (Pa. Super. 1979), *overruled on other grounds*, 453 A.2d 931 (Pa. 1982). The petitioner has provided the court with copies of his PCRA petition, his brief on appeal to the Superior Court and his allocatur petition to the Supreme Court. Those documents reveal that the petitioner relied upon the Superior Court's decision in *Bachert* (along with the Supreme Court's decision in *Huffman*) as the basis for his challenge to the jury instructions given at his trial. Thus, the question whether the Superior Court's 1979 decision in *Bachert* established the requirements of Pennsylvania law was presented to all levels of Pennsylvania's courts and the two courts which rendered written decisions did not conclude that the Superior Court's 1979 decision in *Bachert* established the requirements of Pennsylvania law. This disposition of a question of state law is one which a habeas court should not reexamine. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (The Court emphasized that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). For this reason, when addressing the petitioner's ineffective assistance claim, the court will presume that the Supreme Court's decision in *Bachert* is the earliest relevant decision.

legal developments. Pursuant to 28 U.S.C. § 2254(d)(1) and *Matteo*, this court must consider whether these decisions are "contrary to" or an "unreasonable application" of Supreme Court precedent. Contrary to analysis will be performed first.

The Supreme Court first explained in detail the elements of ineffective assistance of counsel claims in *Strickland v. Washington*. To date, *Strickland* remains the main Supreme Court decision; the two-part test is still adhered to. In *Strickland*, when considering the first part of the test, the Court declined to "exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." 466 U.S. at 688. As the Court remarked, "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689.

In *Smith v. Murray*, 477 U.S. 527 (1986), the Supreme Court considered an attorney's deliberate decision to forgo a claim on direct appeal based on his belief that, at the time he was preparing his direct appeal brief, the law of his state did not support the claim and where it subsequently appeared that the law of the state had changed and the claim was meritorious. *Id.* at 534. The Court concluded that the attorney's decision to forgo the claim was not objectively unreasonable under *Strickland*. *Smith v. Murray*, 477 U.S. at 535-36. The Supreme Court's reasoning in *Smith v. Murray* is consistent with that of the state courts in this case. As such, it cannot be said that Supreme Court precedent required an outcome different from that reached by the state courts. Accordingly, the state court's decision is not "contrary to" Supreme Court precedent. *See Matteo*, 171 F.3d at 888.

The court will also consider whether the state courts' decisions are an "unreasonable application of" Supreme Court precedent. In so doing, the court is permitted to consider the decisions of the federal courts inferior to the Supreme Court. *Matteo*, 171 F.3d at 890. The Third Circuit has frequently noted that an attorney should not be held ineffective for failing to predict a change in the law. *See e.g. Buehl v. Vaughn*, 166 F.3d 163, 180 (3d Cir. 1999); *Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir. 1996); *Senk v. Zimmerman*, 886 F.2d 611, 615 (3d Cir. 1989). These decisions are based upon the first part of the *Strickland* test. *See Buehl*, 166 F.3d at 180; *Sistrunk*, 96 F.3d at 671, 673 n.8; *Senk*, 886 F.2d at 615. Since the state courts' decisions are consistent with Third Circuit decisions which have applied Supreme Court precedent, the state courts' decisions are not an "unreasonable application of" Supreme Court precedent. *See Matteo*, 171 F.3d at 890.

The Court has concluded that the state courts' decisions that trial counsel's performance did not fall short of the objective reasonableness required by the first part of the *Strickland* test were not "contrary to" nor an "unreasonable application of" Supreme Court precedent. Under *Strickland*, it is not necessary to consider the second part of the test since the first part must be decided adversely to the petitioner and his claim must fail. *See Strickland*, 466 U.S. at 697. Because the petitioner's claim must fail, it is not necessary to assess the second explanation provided by the state courts when they denied PCRA relief.

The court also understands the petitioner to claim that trial counsel should have objected to the jury instructions given at his trial on the ground that the first degree murder jury instructions deprived him of due process by misstating or misdescribing an element of the offense and thereby

easing the prosecution's burden of proof on the element. The basis for a due process objection to such an instruction would be *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997). The District Attorney also understands the petitioner to raise this ineffective assistance claim and she has addressed the merits of such a claim.[4]

The opinions of the PCRA court and the Superior Court focus on whether trial counsel should have objected to the first degree murder jury instructions because they

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[4] The District Attorney has also argued that *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny bar the court from affording the petitioner relief based upon this ineffective assistance of counsel claim. The District Attorney has specifically argued that *Teague* bars the court from considering the due process rule announced in *Smith v. Horn*; she has not argued that *Teague* bars the court from considering a rule that counsel is ineffective for failing to object to a jury instruction for the reason that it violates the rule announced in *Smith v. Horn*. The Supreme Court requires great specificity when determining whether a rule is a new one within the meaning of *Teague* and its progeny. *See Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (The Court cautioned that allowing rules to be stated at high levels of generality would render the new rule test meaningless.). This court believes that *Sawyer v. Smith* instructs habeas courts to take care to insure that the rule being considered under *Teague*'s retroactivity analysis is closely consistent with the petitioner's claim. The petitioner's claim in this case is one of ineffective assistance of counsel. *Smith v. Horn*, on the other hand, involved a due process claim, not an ineffective assitance of counsel claim. Accordingly, the court concludes that, even if *Teague* and its progeny would prevent the court from applying the due process rule announced in *Smith v. Horn*, this *Teague* defense (which is the one actually advanced by the District Attorney) does not prevent the court from considering the merits of the petitioner's ineffective assistance of counsel claim.

misstated the requirements of Pennsylvania law. Those opinions do not address the related question of whether trial counsel should have also objected on the ground that the jury instructions violated due process. Since there is no indication that this question of law was considered by the state courts, 28 U.S.C. § 2254(d)(1) does not apply. Accordingly, the court will engage in de novo review which was the traditional form of review prior to the enactment of the AEDPA.

The District Attorney argues that the authority for the petitioner's contention that the jury instructions in his case on accomplice liability violated due process was not established until the Third Circuit decided *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997). As the District Attorney notes, in *Smith v. Horn* the Third Circuit acknowledged that the Supreme Court had never expressly held that a jury charge which eases the state's burden of proof on an element of an offense by omitting or materially misdescribing the element would violate due process. *Id.* at 416. The court went on to acknowledge that its holding that such an instruction would violate due process constituted a prediction of how the Supreme Court would decide the issue. *Id.*

Because the holding in *Smith v. Horn* was unprecedented in 1997, a fortiori, it was unprecedented in 1980, the time of the petitioner's trial. As such, counsel would have had to engage in predicting what the law would become in order to have raised such a claim. The Supreme Court has never required an attorney to exhibit such prescience in order to render objectively reasonable assistance to a client. *See Smith v. Murray*, 477 U.S. at 535-36. Neither has the Third Circuit. *See Buehl v. Vaughn*, 166 F.3d at 180 ("[A] lawyer's failure to perceive the ground for crafting an argument that might have succeeded is very different from the failure to meet the level of competence required by the Sixth

Amendment."). For these reasons, the court concludes that trial counsel did not provide objectively unreasonable representation when he failed to argue that the jury instructions in the petitioner's case violated due process because they misstated the mens rea required in order to properly convict him of first degree murder. Because the petitioner cannot satisfy the first part of the *Strickland* test, there is no need to address the second part of the test and his claim of ineffective assistance of counsel fails. *Strickland*, 466 U.S. at 697.

My recommendation follows.

RECOMMENDATION

AND NOW, this 17th day of June, 1999, for the reasons contained in the preceding Report, it is hereby RECOMMENDED that the petition for a writ of habeas corpus be DENIED. It is also RECOMMENDED that a certificate of appealability not be granted.

/s/
DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	No. 345 Eastern District Allocatur Docket 1997
v.	:	
GERALD EVERETT, Petitioner.	:	Petition for Allowance of Appeal from Superior Court

ORDER

PER CURIAM

AND NOW, this 30th day of October, 1997, the Petition for Allowance of Appeal is hereby DENIED.

TRUE COPY FROM RECORD
Attest: October 30, 1997

/s/_____
Patricia A. Johnson, Chief Clerk
Supreme Court of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYL-VANIA
vs	:	
GERALD EVERETT, Appellant	:	No. 02237 Philadelphia 1996

Appeal from the Post Conviction Relief Act
June 12, 1996 in the Court of Common Pleas of
Philadelphia County, Criminal No. 0040-43
August Term, 1979

BEFORE: CIRILLO, P.J.E., and EAKIN and BROSKY, JJ.

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: June 17, 1997

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs	:	
GERALD EVERETT, Appellant	:	No. 02237 Philadelphia 1996

Appeal from the Post Conviction Relief Act
June 12, 1996 in the Court of Common Pleas of
Philadelphia County, Criminal No. 0040-43
August Term, 1979

BEFORE: CIRILLO, P.J.E., and EAKIN and BROSKY, JJ.

MEMORANDUM: FILED JUN 17 1997

This is an appeal from an order of the Court of Common Pleas of Philadelphia County denying appellant Gerald Everett's fourth petition for post-conviction relief. *See* 42 Pa.C.S.A. § 9541 *et seq*. We affirm.

Gerald Everett was tried before a jury and convicted of first-degree murder, robbery and criminal conspiracy. Post-verdict motions were denied and the court sentenced Everett to concurrent terms of life imprisonment for murder, ten to twenty years for robbery and five to ten years for criminal conspiracy. On direct appeal, this court affirmed the judgment of sentence. The Pennsylvania Supreme Court denied allocatur.

Everett filed a pro se petition for relief under the former Post-Conviction Hearing Act (PCHA), 42 Pa.C.S.A. § 9541 *et seq*. (Purdon 1982) (superceded). This petition was later amended by counsel, Frank A. Mayer, III, Esq., and a

second amended petition was filed. The petition raised several claims of ineffectiveness of trial counsel. Prior to the hearing on this petition, attorney Mayer withdrew three of the claims raised in the petition; the fourth and final claim was withdrawn at the hearing before the Honorable Edward J. Blake, at which time Judge Blake denied relief.

Everett appealed, represented by new counsel, Sye-Payne, Esq. This court remanded for an evidentiary hearing. The PCHA court instructed counsel to file an amended petition, which she did. In the amended petition, Everett raised several claims of trial counsel's ineffectiveness. Everett then sent a letter to counsel instructing her to withdraw the petition. Counsel complied with this request.

Thereafter, Everett filed a third petition through new counsel, Stanton M. Lacks, Esq. In that petition, Everett again raised claims of trial counsel's ineffectiveness. A hearing was held before the Honorable James D. McCrudden. The petition was dismissed. Everett appealed and this court affirmed. The Pennsylvania Supreme Court denied allocatur.

In 1995, Everett filed a petition for collateral relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. § 9541 *et seq*. Represented now by Norris E. Gelman, Esq., Everett raised various claims of trial counsel's ineffectiveness. On June 12, 1996, the PCRA petition was denied. This appeal followed.

Everett raises the following issues for review:

1. Did the accomplice charge given in appellant's trial result in his conviction being a miscarriage of justice and if so must his successive PCRA petition be considered on the merits?

2. Was trial counsel ineffective for failing to object to the charge of the court which misdefined accomplice liability for first-degree murder and invited the jury to find appellant guilty of first-degree murder based on the actions and intent of the actual slayer without regard to whether or not he harbored and shared the requisite specific intent to kill which is an element of the crime of first-degree murder?

Everett complains that trial counsel was ineffective for failing to request that the trial court charge the jury that it must find that he, the accomplice, shared the principal's intent to kill as a prerequisite for accomplice liability for first-degree murder.

A post-conviction petitioner may not obtain relief on a second or successive PCRA petition unless "a strong *prima facie* showing is offered to demonstrate that a miscarriage of justice may have occurred[.]" *Commonwealth v. Lawson*, 519 Pa. 504, ___, 549 A.2d 107, ___ (1988). The Post-Conviction Relief Act was not designed to create continuous assaults on the judgment of sentence. *Id.* at 509, 549 A.2d at 111. Post-conviction relief was designed to insure due process of law for questions not previously raised or litigated. *Commonwealth v. Murray*, 315 Pa. Super. 417, 462 A.2d 264 (1983).

Our standard of review when evaluating a claim of ineffective assistance of counsel is well settled. We presume that trial counsel is ineffective and place on the defendant the burden of proving otherwise. *Commonwealth v. Williams*, 524 Pa. 218, 230, 570 A.2d 75, 81 (1990). We are first required to determine whether the issue underlying the claim is of arguable merit. *Commonwealth v. Johnson*, 527 Pa. 118, 122, 588 A.2d 1303, 1305 (1991). If the claim is

without merit, our inquiry ends because counsel will not be deemed ineffective for failing to pursue an issue which is without basis. *Id.* Even if the underlying claim has merit, the appellant still must establish that the course of action chosen by his counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial. *Id.*; *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). The same showing of prejudice must be made by an appellant whether on direct appeal from a judgment of sentence or on appeal from denial of PCRA relief. *Commonwealth v. Kimball*, --- Pa. Super. ---, 683 A.2d 666 (1996) (*en banc*).

In 1994, the Pennsylvania Supreme Court decided the case of *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994). In *Huffman*, the Court held that when giving a jury charge on accomplice liability for a crime involving specific intent to kill, the jury must consider the mental statement of the accomplice and not depend only upon proof of the principal's intent to kill. *Huffman, supra; see also Commonwealth v. Bachert*, 499 Pa. 398, 453 A.2d 931 (1982). As the Honorable David Savitt has has [sic] cogently explained in his opinion, the *Huffman* case was decided in 1994, and the *Bachert* decision was filed on December 17, 1982, both *after* the appellant's trial, conviction, and completion of direct appeal. The general rule of retroactivity, therefore, is not applicable. *See Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986) (general rule of retroactivity does not apply to any case on collateral appeal unless the decision was handed down during the pendency of the defendant's direct appeal). *See also Commonwealth v. Beasley*, [---] Pa. ---, 678 A.2d 773 (1996) (counsel cannot be found ineffective for failing to raise a meritless objection at time of trial or for failing to predict legal developments); *Commonwealth v. Fahy*, 537 Pa. 533, 645 A.2d 199 (1994);

Commonwealth v. Yarris, 519 Pa. 571, 605-06, 549 A.2d 513[,] 531 (1988); *Commonwealth v. Anderson*, 501 Pa. 275, 461 A.2d 208 (1983).

Judge Savitt properly disposed of this claim. We, therefore, affirm the order deny[ing] post-conviction relief.

Order affirmed.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	AUGUST TERM, 1979 NO. 0440
v.	:	
GERALD EVERETT	:	SUPERIOR COURT NO.

OPINION

SAVITT, J. JUNE 12, 1996

FACTS AND PROCEDURAL HISTORY

Raymond Gray and Robert Burgess were driven to the 1600 block of Kater Street by petitioner, Gerald Everett, in his car. During the drive the men discussed "pulling a job." Petitioner dropped the two men off near a candy store which they intended to rob. When Gray and Burgess entered the candy store and announced a robbery, a struggle ensued between the older clerk and one robber, at which point the second robber walked over to the clerk and shot him once in the chest causing his death. The two men fled the store and were picked up by petitioner who drove them away from the scene and then to a friend's house where they disposed of the guns used in the robbery.

Petitioner was convicted of first degree murder, robbery and criminal conspiracy on October 9, 1980. Following an appeal, the Superior Court affirmed petitioner's conviction and *allocatur* was denied by the Pennsylvania Supreme Court

on August 31, 1982. There have been previous PCHA petitions filed, the last having been dismissed by Judge James McCrudden on September 13, 1989.

OPINION

In his current petition, petitioner alleges that prior counsel were ineffective for failing to object to the court's charge on accomplice liability and specific intent to kill and for failure to raise the sufficiency of the evidence.

A petitioner is not entitled to PCRA review on an issue that has been previously litigated. 42 Pa.C.S.A. §9543(a)(3). An issue has been previously litigated if: "(1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the Petitioner did not appeal; (2) the highest appellate court in which Petitioner could have had review as a matter of right has ruled on the merits of the issue; or (3) it has been raised in and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S.A. §9544(a).

With respect to the issue of ineffectiveness, counsel is presumed to be effective and the defendant has the burden of proving ineffectiveness. *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (1990); *Commonwealth v. McNeil*, 506 Pa. 607, 587 A.2d 802 (1985); *Commonwealth v. Stinnet*, 356 Pa. Super. 83, 514 A.2d 154 (1986). In order to carry this burden the defendant must first show that the claim which counsel failed to raise has arguable merit and that counsel's failure to raise it was without a reasonable basis which would effectuate the defendant's best interests. *Strickland v. Washington*, 466 U.S. 688 (1984); *Commonwealth v. Basemore*, 525 Pa. 512, 582 861 (1990); *Commonwealth v. Buel*, 510 Pa. 363, 508 A.2d 1167 (1986); *Commonwealth ex rel Washington v.*

Maroney; 427 Pa. 599, 235 A.2d 349 (1967). Second, the defendant must show that counsel's ineffectiveness worked to his prejudice. *Strickland v. Washington*, supra; *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987), *Commonwealth v. Buel*, supra; *Commonwealth v. Garvin*, 355 Pa. Super. 560, 485 A.2d 36 (1984). In order to show prejudice the defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial could have been different. *Strickland v. Washington*, supra, *Commonwealth v. Pierce*, supra.

Trial counsel was not ineffective for failing to raise the sufficiency of the evidence since the issue was raised in his post verdict motions. The sufficiency of the evidence was discussed in the trial court's opinion and the Superior Court in affirming adopted the trial court's opinion holding that the evidence was sufficient to support petitioner's convictions. Accordingly, the issue of sufficiency has been fully litigated and cannot be raised again in this proceeding.

Petitioner relies on *Commonwealth v. Bachert*, 499 Pa. 398, 453 A.2d 931 (1982) and *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994) for the proposition that trial counsel was ineffective for not objecting to the court's charge. This reliance is misplaced. Petitioner was tried and convicted in October of 1980. Neither case had been decided at the time of trial in this case and trial counsel cannot be held to be ineffective for failing to raise an issue which was not law at the time.

Further, in *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986) the Pennsylvania Supreme Court held that the general rule of retroactivity does not apply to any case on collateral appeal unless that decision was handed down during the pendency of the defendant's direct appeal.

Petitioner's direct appeal was completed in August of 1982 when *allocatur* was denied by the Pennsylvania Supreme Court. *Bachert*, supra was filed on December 17, 1982. Accordingly, neither case is not applicable to this case and petitioner is not entitled to a new trial on this basis.

/s/ Savitt, J.

EXCERPT FROM APPELLANT'S BRIEF ON COLLATERAL APPEAL (DOCKETED AT NO. 2237, PHILADELPHIA 1996, PA. SUPERIOR CT.)

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE CHARGE OF THE COURT WHICH MISDEFINED ACCOMPLICE LIABILITY FOR FIRST DEGREE MURDER BASED ON THE ACTIONS AND INTENT OF THE ACTUAL SLAYER WITHOUT REGARD TO WHETHER OR NOT HE HARBORED AND SHARED THE REQUISITE SPECIFIC INTENT TO KILL WHICH IS AN ELEMENT OF THE CRIME OF FIRST DEGREE MURDER.

The charge given here without objection and which was the subject of Appellant's ineffectiveness allegations cannot be distinguished in a meaningful principled manner from that given in ***[Commonwealth v.] Huffman***[, 536 Pa. 196, 638 A.2d 961 (1994)].

> First: Murder of the first degree:
>
> In order to find this defendant guilty of murder in the first degree, you must find that all of the following elements have been established by the Commonwealth beyond a reasonable doubt: One, that the defendant or an accomplice caused the death of another person -- in this case Mr. Jennings; that is, you must find that the death of Mr. Jennings would not have occurred but for the *alleged acts of the defendant or his accomplices*, if there are any in this case.

Two: that the killing was intentional . .

A killing is willful and deliberate if *the defendant and/or his accomplice*, if there were any, consciously decided to kill the victim, and it is premeditated *if the defendant or his accomplice*, if there were any accomplices, possessed a fully informed intent to kill at the time when the killing took place, even though there need not have been any appreciable amount of time between the time *when the defendant and/or the accomplice*, if any, first conceived the idea of killing, and the time when the action took place.

An intentional killing, as I have defined it for you, may be found from any expressed words used *by the defendant or his accomplice*, if any exist, or may be implied from the words or conduct of the defendant or his accomplice.

It should be noted that if *the defendant or his accomplice*, if any, intentionally used a deadly weapon, such as a gun, with bullets in it, on a vital part of the victim's body, you may infer from this fact, or these facts, that the killing was intentional, and therefore willful, deliberate and premeditated.

If, after considering all the evidence you find that the Commonwealth has established each of these elements beyond a reasonable doubt, then you may find the defendant guilty of first degree murder. (N.T. 10/8/80 pgs. 5.34 to 5.36) (Emphasis supplied).

These instructions were virtually repeated when the deliberating jury asked that the court review the definitions of

first, second and third degree murder. (N.T. 10/8/80 pgs. 5.72-5.74).

As in ***Huffman*** the charge given instantly allowed a first degree murder conviction (which Appellant suffered) to be secured without a jury "finding of the requisite mental state of 'specific intent to kill' on the part of the accomplice/ appellant." ***Huffman*** at 963. This violated the teachings of ***[Commonwealth v.] Bachert***[, 271 Pa. Super. 72, 412 A.2d 580 (1980), overruled on other grounds, 499 Pa. 398, 453 A.2d 931 (1982)].

As in ***Huffman***, the charge given herein allowed Appellant to be convicted as an accomplice based on the intent and/or actions of the principal. This violated the teachings of ***Bachert*** as well as the teachings of ***Clark v. Jago***, 676 F.2d 1099, 1106 (6th Cir. 1982).

And our Supreme Court recently more fully explicated ***Huffman*** in ***Commonwealth v. Thompson***, 543 Pa. 634, 674 A.2d 217, 222 (1996):

> In ***Huffman*** the charge as given was an incorrect statement of the law. The charge in ***Huffman*** incorrectly advised the jury that it could find the defendant guilty of first degree murder *if either he or his co-conspirator possessed the necessary specific intent to kill* at the time of the murder. (Emphasis supplied).

In each instance the jury was invited to predicate the guilt of the nontriggerperson accomplice on the guilt/intent of the principal actor, the triggerperson.

In each instance the jury was invited to predicate the guilt of the nontriggerperson on what "the defendant and/or his accomplice" did or intended.

In each instance, the trial court never instructed the jury that in this felony murder prosecution, in order to find the nontriggerperson accomplice guilty of first degree murder it had to find that he harbored and shared the specific intent to kill the deceased with the triggerperson.

Petitioner's instant PCRA Petition was based on this issue.

It was denied on the merits, The Honorable David Savitt holding that Petitioner's counsel was not ineffective because he believed that as of the date of Petitioner's jury trial, this was not the law and the concepts ensconced in ***Huffman***, ***Thompson*** and ***Bachert*** only became manifest on December 17, 1982 when ***Bachert*** was filed by the Supreme Court, and not on either October 19, 1979 when the Superior Court decision in ***Bachert*** authored by former Chief Justice Nix was filed or on January 16, 1980 when reargument was denied by the Superior Court thereon.

Petitioner argued to no avail below that the ***Bachert*** decision upon which he relied was ***Commonwealth v. Bachert***, 271 Pa. Super. 72, 412 A.2d 580 (1979), reargument denied January 16, 1980 which was authored by former Chief Justice Nix. It was overruled but on other grounds in ***Commonwealth v. Bachert***, 499 Pa. 398, 453 A.2d 931 (1982) which was issued on December 17, 1982.

Petitioner was tried in October of 1980, a year after Justice Nix's Superior Court opinion in ***Bachert*** was filed.[1]

Huffman, relying on the Superior Court decision in ***Bachert***, declared this either/or jury instruction to be an outright misstatement of the law and a miscarriage of justice and ***Bachert*** was the law of Pennsylvania at the time of Petitioner's trial.

The legal requirement is that the intent be ***shared -- harbored by both*** the actual slayer and whomsoever is his accomplice.

Here, the trial court allowed Petitioner to be convicted even if the specific intent to kill was ***not shared***, but was found only in the actual slayer, and this is an egregious error that goes to the very heart of Petitioner's conviction.

A fast review of the record shows no one involved knew what they were doing. The prosecutor asked the court to charge (at the conclusion of the final charge):

> MR. DiDONATO: Yes. I thought the charge was eminently fair. The only request I have that your Honor express to the jury the fact that in order to convict this defendant of first degree murder they do not have to find that he expressly agreed to kill someone ahead of time, *only to commit the robbery*.
>
> THE COURT: I said that. (N.T. 10/8/80 pg. 5.56) (Emphasis supplied).

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[1] At that time panels of the Superior Court deciding murder cases each had one Justice of the Supreme Court sitting.

This is second degree murder (felony murder) -- not first degree murder.

Pennsylvania abrogated the ***Pinkerton*** concept of conspiratorial liability long ago.

The Crimes Code is based on the Model Penal Code, and the Model Penal Code firmly rejected the ***Pinkerton*** broad based conspiratorial liability. See ***Pinkerton v. United States***, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); **Model Penal Code, Tentative Draft No. 1**, pgs. 20-24 (1953).

Trial counsel had a glimmer of understanding, reminding the Court that he had used the term "shared criminal intent" in his opening and closing addresses, in seeking that the Court "consider the possibility of instructing the jury on the definition of shared criminal intent" because the Court "did not do that during the course of its charge."

To this the trial Court responded:

> THE COURT: That's theoretically the same as transferred intent, is it not? (N.T. 10/8/80 pg. 5.59).

The Court continued in this vein:

> THE COURT: I think the Court did. I'm going to tell you why: You used the word "shared criminal intent"; that's the same thing, as I understand it, as "transferred intent." Transferred intent is, as I understand it, the following . . . .

Shared intent and transferred intent are just not equivalents.

The jury asked that the degrees of murder be redefined.

The Court did so making the same egregious errors and inviting the jury to again find the defendant guilty of first degree murder based on his accomplice's intent and actions.

The Court recharged that in order to convict Petitioner of first degree murder the jury had to find (1) that the defendant (Petitioner) or his accomplice (the actual slayer) caused the death of Mr. Jennings and (2) that the killing was intentional, intentional meaning that it is willful and deliberate because "the defendant and/or an accomplice, if you were to so find, consciously decided to kill the victim." (N.T. 5.72, 5.73).

Premeditation was satisfied if "the defendant and/or his accomplice, as the case might be, possessed a fully formed intent to kill at the time he did, even though there need not be, or need not have been any appreciable amount of time between the time when the defendant, or the accomplice, if you so find, first got the idea, or first conceived of the idea of killing, and the time when the person acted." (N.T. 5.73).

Again the Court invited Petitioner's conviction if the jury merely found that his accomplice acted deliberately, intentionally and possessed a fully formed intent to kill. This is the effect of the repeated use of "the defendant and/or his accomplice, if you so find." The either/or invitation allows the jury to focus on the actions and the intent of the accomplice (here the actual killer) while excluding Petitioner's intent and actions. That is what is meant by an "either/or" choice.

Appellant may not be convicted of first degree murder based on the intent of his accomplice. It is just that simple.

Appellant had every right to be judged on his intent -- his actions, and it was just plain wrong to allow his jury to do otherwise.

Appellant has suffered a first degree murder conviction where the jury was invited not to consider his intent -- where the probability is great that he was judged based on the actions and intent of the actual slayer, and his intent, perhaps the most crucial element of first degree murder could be ignored under the instructions given.

Due process of law under the federal constitution requires that a defendant not be convicted of a crime unless the jury is first informed -- correctly -- of the legal definition of that crime and the facts that the prosecution must prove. ***Carella v. California***, 491 U.S. 263 (1899):

> The Due Process clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases. ***Carella***, ***supra***, at 265.

Rock v. Zimmerman, 959 F.2d 1237, 1246 (3rd Cir. 1992) held:

> [I]f a jury is instructed that the State may satisfy its burden by something less than evidence which convinces the jury of each element of the offense beyond a reasonable doubt, the Due Process Clause is violated.

See also ***Commonwealth v. Ford-Bey***, 504 Pa. 284, 472 A.2d 1062 (1984).

This very issue has reached the Circuit Courts.

In ***Martinez v. Borg***, 937 F.2d 422, 423 (9th Cir. 1991) the Ninth Circuit held that the omission of the specific intent element from jury instructions in the trial of a charge of aiding and abetting deprives the defendant of his constitutional right to have the jury decide each element of the charged offense beyond a reasonable doubt. See also ***Roy v. Gomez***, 81 F.3d 863 (9th Cir. 1996).

The charge given in this case also diluted the Commonwealth's burden of proving the offense beyond a reasonable doubt, making the offense far easier to prove. Here, under the instructions given, the jury had to find only that the actual slayer -- someone other than Appellant -- specifically intended to kill the victim.

Indeed, these instructions clearly fall into ***Huffman*** error as held by ***Commonwealth v. Thompson***, 543 Pa. 634, 674 A.2d 217 (1996) and ***Huffman*** relied on ***Bachert***. ***Thompson*** held:

> In ***Huffman*** the charge as given was an incorrect statement of the case. The charge in ***Huffman*** incorrectly advised the jury that it could find the defendant

> guilty of first degree murder *if either he or his co-conspirator possessed the necessary specific intent to kill* at the time of the murder. (Emphasis supplied).

It is clear that the charge given herein deprived Appellant of due process law in that it permitted his conviction of first degree murder based not on his intent, but on the intent of the actual slayer. Indeed, the record discloses that Appellant's role was that of the get-away-car driver and not present when the actual slaying occurred.

While he may properly have been convicted of felony murder, where specific intent to kill is an element of the crime, as in first degree murder, a conviction of first degree murder where the instant charge was given cannot be allowed to stand.

The Supreme Court has already decided that the first degree murder conviction must be reversed -- the related convictions need not be reversed.